91-961

Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

October Term 1991

INTERNATIONAL CHEMICAL COMPANY
AND EASTOAK COAL COMPANY,
Petitioners,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. What are the elements which must be proven by the General Counsel for the National Labor Relations Board (NLRB) to establish a joint employer relationship under *Boire v. Greyhound Corporation*, 376 U.S. 473 (1964), for purpose of establishing who is an employer under the National Labor Relations Act?

2. Whether, contrary to *Atchison, Topeka and Santa Fe Railroad Company v. Board of Trade*, 412 U.S. 800, 808 (1973), the NLRB departed in this case, without explanation, from its previous formulation of the joint employer theory.

3. Whether the National Labor Relations Board and the Court of Appeals denied International Chemical Company (ICC) due process under the law when they found ICC liable for a violation of the National Labor Relations Act under the single employer theory when the joint employer theory was the only one alleged and tried.

4. Whether there is substantial evidence to support the NLRB's finding that ICC and Eastoak Coal Company were joint employers with Hobbs and Oberg Mining Company, Inc.[1]

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TABLE OF AUTHORITIES

Cases:

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[1]Pursuant to Rule 21.1(b), the only parties in the Court of Appeals and NLRB proceedings which are not disclosed in the caption of this case is Hobbs and Oberg Mining Company, Inc. and the Oklahoma Coal Miners Union. There are no parent or subsidiary companies of Petitioners other than wholly owned subsidiaries.

Cases: (Continued)

Constitution and statutory provisions:

IN THE

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INTERNATIONAL CHEMICAL COMPANY
AND EASTOAK COAL COMPANY,
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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

CITATION TO DECISIONS BELOW

The National Labor Relations Board's decision appears in 197 NLRB No. 85, 133 L.R.R.M. (BNA) 1251 (1990). The Court of Appeals's decision is an unpublished Order and Judgment. Both decisions are included in their entirety in the appendix to this Petition.

STATEMENT OF JURISDICTION

The Order and Judgment of the United States Court of Appeals for the Tenth Circuit was filed August 14, 1991. No petition for Rehearing was filed. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

The Judgment of the Court of Appeals for which review is sought enforced an Order of the National Labor Relations Board (NLRB) pursuant to that Court's jurisdiction under 29 U.S.C.§160(e).

Petitioner Eastoak Coal Company ("ECC") is the wholly-owned subsidiary of Petitioner International Chemical Company ("ICC"). Since January, 1985, Hobbs and Oberg Mining Company, Inc. ("Hobbs") has owned a coal mine in Porter, Oklahoma. Because Hobbs was not producing coal in sufficient quantities to meet its commitments pursuant to a contract with ICC, it contracted with ECC to develop and manage a strategy for mining the coal more efficiently. ECC's representative at the mine was Larry Blevins.

On May 31, 1988, Hobbs, because of severe financial problems, was forced to close down the mine and lay off all of its employees. Hobbs, both before and after the closing, offered to sell the mine to ECC. These offers were rejected. After approximately four days of negotiations, however, Hobbs agreed to subcontract its mining operations to ECC. This assignment relieved Hobbs of all participation in the mining operation while allowing it to retain ownership of its mine.

After ECC reopened the mine, the record shows only four former Hobbs employees applying for work with ECC. Of those four, only one was denied employment. After it took over the mine, ECC did not assume Hobbs's collective bargaining agreement. The Union also made no bargaining demand on ECC once ECC became the employer.

The NLRB adopted, with slight modification, the decision of the Administrative Law Judge ("ALJ"). That decision found that ICC and ECC violated the National Labor Relations Act as follows:

1. Hobbs's termination of the employees when the mine was shut down was a violation of 29 U.S.C. §158(a)(3). ICC

and ECC were held liable for those violations on the theory that they were joint employers with Hobbs when the termination occurred.

2. ECC and ICC, as joint employers with Hobbs, refused to recognize and bargain with the Union and repudiated the collective bargaining agreement after the mine was reopened, in violation of 28 U.S.C. §158(a)(5) and (1).

3. In violation of 29 U.S.C. §158(a)(3), ICC and ECC refused to hire two former Hobbs employees after the mine was reopened.

The Court of Appeals enforced the Order of the NLRB without modification.

ARGUMENT

In *Boire v. Greyhound Corporation*, 376 U.S. 473 (1964), this Court held that two or more independent legal entities may both be found to be employers under the National Labor Relations Act if they "share or co-determine those matters governing [the] essential terms and conditions of employment" of the employees whose rights under the Act have been violated. The National Labor Relations Board has followed this "joint employer" theory. *See, e.g., Laerco Transportation*, 269 NLRB 324, 325 (1984); *TLI, Inc.*, 271 NLRB 798 (1984); *Island Creek Coal Company*, 279 NLRB 858, 863 (1986); and *International Shipping Association, Inc.*, 297 NLRB No. 172, 134 L.R.R.M. (BNA) 1035 (1990).

However, when the entities in question are interrelated, rather than independent, the NLRB, rather than applying the joint employer theory, has applied a "single employer theory" based on factors approved by this Court in *Radio Union Television Broadcast Technicians Local 1264 v. Broadcast Services*, 380 U.S. 255 (1965). These four factors are (1) functional interrelation of operations; (2) centralized control of labor relations; (3) common management; and (4) common ownership or financial control. *Parklane Hosiery*

Co., Inc., 203 NLRB 597, 612 (1973), *amended* 207 NLRB 999 (1973). The NLRB maintains a clear distinction between the single employer theory and the joint employer theory. *TLI, Inc.*, 271 NLRB 798, 802 (1984).

In this case, as the ALJ specifically found, the only theory alleged and tried in the General Counsel's case against ICC and ECC was the joint employer theory, not the single employer theory (ALJ, A-41).[2] Nevertheless, the ALJ found that ICC and ECC were joint employers because of his conclusion that they were operated as a "single, integrated enterprise." (ALJ, A-29) In other words, he found them to be a "single employer." See *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117, 1122 (3d Cir. 1982), where the phrase "single integrated enterprise" is used to define "single employer" Because ICC was only on notice that it was defending against the joint employer theory, imposing liability upon it under the single employer theory deprived ICC of due process under the law.

In formulating the joint employer theory in this case, the NLRB has also departed, without explanation, from its previous statement of the theory. As noted in *International Shipping Association*, 297 NLRB No. 172 at n.8, the NLRB once held to the "old theory, which enabled joint employer status to be found if the alleged joint employer 'exercised effective control' over the working conditions of the employees." The Board now requires, however, that before a joint employment relationship will be found, there must be proof of actual control over how the work of employees is to be performed. *Island Creek Coal Company*, 279 NLRB 858, 863 (1986). Determination of where and when certain tasks are to be performed is not considered by the NLRB to be control over matters of employment. *Id.* In addition, although a company may be "in overall charge of the

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[2]"ALJ" refers to the opinion of the Administrative Law Judge which is included in the appendix of this petition. "A-41" refers to the page of the opinion as it appears in the appendix

facility," that fact does not establish that the company is a joint employer with another company that actually employs the employees at the facility. *International Shipping Association*, 297 NLRB No. 172 (1990).

In this case, however, the NLRB, in adopting the ALJ's decision, reverted to its old theory without explanation in holding that ECC's involvement at the policy level at the mine prior to its closing, made it a joint employer with Hobbs and Oberg.[3] Furthermore, rather than following this Court's pronouncement in *Boire v. Greyhound Corporation* that joint employment is found if two entities "share or co-determine those matters governing the essential terms and conditions of employment," the Board, through the ALJ, held that a company's involvement at the policy level which "affects" the terms and conditions of employment at the plant (as opposed to controlling how work is to be performed) is adequate to establish that company as a joint employer. Specifically, the ALJ held:

> Joint employer status is not limited to routine matters of supervision, but includes the policy level that controls the mundane affairs of the pit level. This is implicit in the concept of meaningfully affecting the terms and conditions of employment of the workers.

(ALJ, A-46)

Confusion over what constitutes a joint employer exists not only within the NLRB itself, but also between the Courts of Appeal. The Third Circuit maintains the NLRB's usual distinction between the joint employer and single employer theories. *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117 (3d Cir. 1982). On the other hand, the Eighth Circuit,

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[3]*See, e.g., Island Creek Coal Company*, 279 NLRB 858 (1986) where virtually the same facts yielded a result opposite the one reached in this case.

in *Pulitzer Publishing Company v. NLRB*, 618 F.2d 1275 (8th Cir. 1980), *cert. denied* 440 U.S. 875 (1980) and *Miscellaneous Drivers and Helpers Union Local No. 610 v. NLRB*, 624 F.2d 831 (8th Cir. 1980), has imposed a single employer standard in joint employer situations. The Sixth and Seventh Circuits have created a hybrid standard for determining joint or single employment relationship by merging the standards in *Boire* and *Radio Union Television*. *See Davis v. NLRB*, 617 F.2d 1264, 1271 (7th Cir.1980); *Sheeran v. American Commercial Lines, Inc.*, 683 F.2d 970 (6th Cir. 1982). The Second Circuit in *Clinton's Ditch Cooperative Co., Inc. v. NLRB*, 778 F.2d 132, 138 (2d Cir. 1985), *cert. denied* 107 S.Ct. 67 (1980), has not endorsed either theory and has articulated five factors of its own for resolving single and joint employer cases. Because of this confusion in the circuits and the NLRB, there is a lack of a well-defined standard to which those charged with unfair labor practices may look to in defending themselves. In order to resolve this confusion, this Court should review the Judgment of the Court of Appeals enforcing the Order of the NLRB.

CONCLUSION

For the reasons set forth above, this Court should grant this Petition for Writ of Certiorari to the United States court of Appeals for the Tenth Circuit.

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Filed August 14, 1991

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

No. 90-9523

Petitioner, (NLRB No. 16-CA-13286)

-vs-

HOBBS & OBERG MINING COMPANY, INC., INTERNATIONAL CHEMICAL COMPANY and EASTOAK CHEMICAL COMPANY

Respondents.

OKLAHOMA COAL MINERS UNION,

Real Party in Interest.

ORDER AND JUDGMENT*

Before MCKAY and LOGAN, Circuit Judges, and WINDER, District Judge**

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* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for the purpose of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

** The Honorable David K. Winder, United States District Judge for the District of Utah, sitting by designation.

This matter is before the court on the application of the National Labor Relations Board (NLRB) for the enforcement of its order issued against Hobbs & Oberg Mining Company (H&O), International Chemical Company (ICC), and Eastoak Chemical Company ("ECC"), (collectively, ""the Companies"). The NLRB issued an Order on January 31, 1991 requiring the Companies to cease and desist from unfair labor practices relating to interfering with, restraining, or coercing employees in the exercise of their statutory rights. The Order directs the Companies (1) to bargain with the coal miners' Union (on request of the Union); (2) to terminate the June 4, 1897, contract mining agreement involving work of the bargaining unit; (3) to offer all bargaining unit employees terminated on May 31, 1987, immediate and full reinstatement with full reimbursement for any loss of earnings; (4) to remove from employees' files any references to the employees' unlawful discharges; and (5) to post an appropriate notice.

On September 1, 1988 an administrative law judge ("ALJ") heard the case and issued an Order which was substantively the same as the modified Order of the NLRB. The Companies filed objections to this Order. The NLRB's general counsel filed a limited exception to the Order, objecting to the remedy of the ALJ.

The NLRB, by a three-member panel, affirmed the decision of the ALJ with a modification in the remedy as proposed by the general counsel. The NLRB found that H&O, ICC and ECC were joint employers and that the Companies violated sections of the National Labor Relations Act ("Act"), specifically, 29 U.S.C. § 158(a) (3) and (1) and 29 U.S.C. § 158(a) (5) and (1).

Since January 1985, H&O operated a coal mine in Porter, Oklahoma. H&O contracted to sell coal to ICC but in late 1986 was unable to supply the tonnage required the contract. ICC placed its employee, Mr. Blevins, in charge of the mine. In May 1987, H&O closed the mine and terminated all

In May 1987, H&O closed the mine and terminated all employees. The mine reopened under the control of the Companies. The Companies lowered wages, eliminated benefits, and did not rehire employees involved in the coal miners' Union.

The conclusions of the ALJ were factual determinations based upon credibility findings. These were affirmed by the NLRB. This court will not reverse factual determinations unless they are not supported by substantial evidence in the record as a whole. Universal Camera Corp. v. NLRB, 340 U.S. 474, 487-88 (1951). The court concludes there is substantial evidence to support the findings of the ALJ and the NLRB. The court further agrees with the NLRB's finding that the Companies were joint employers within the meaning of Section 2(2) of the Act, 29 U.S.C. § 152(2).

Thus, we are in accord with the NLRB's conclusions and affirm substantially the reasons stated in the orders of the NLRB and the ALJ.

Entered for the Court

David K. Winder
District Judge

297 NLRB No. 85

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

HOBBS & OBERG MINING COMPANY, INC.,
INTERNATIONAL CHEMICAL COMPANY AND
EASTOAK COAL COMPANY, JOINT EMPLOYERS

and Case 16--CA--13286

OKLAHOMA COAL MINERS UNION

DECISION AND ORDER

On September 1, 1988, Administrative Law Judge Richard J. Linton issued the attached decision. Respondent Hobbs & Oberg Mining Company, Inc. (Hobbs) and Respondents International Chemical Company (ICC) and Eastoak Coal Company (ECC) filed exceptions and supporting briefs. The General Counsel filed a limited exception and a supporting brief and a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified,

[1]The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear

and to adopt the recommended Order as modified.[2]

1. We adopt the judge's finding that since February 1987 Hobbs, ICC and ECC have acted as joint employers of the employees in the bargaining unit. In so finding (regarding the pre-May 3, 1987 period), we note particularly (though not to the exclusion of other facts noted by the judge) Larry Blevins' March 1987 comment to Union President Dean that Blevins was "running" the job, that "Hobbs and Oberg no longer have anything to do with the job, they're out," and that if there was any union business to discuss from that time on, Dean should talk with Blevins; Blevins's March or April 1987 statement to welder-mechanic Walker, "I'm the boss, and you do what I tell you to do;" Blevins's March 1987 role in resolving the contract dispute with the Union over the issue of Sunday pay; and Blevins's March 1987 participation with James Hobbs and Ron Sisney in unsuccessfully trying to persuade Walker to convert to a contract welder-mechanic. We do find it unnecessary, however, to rely on Blevins's alleged role in hiring Sisney.

2. We agree with the judge's finding that ICC is liable as a joint employer. As noted by the judge, the evidence shows that ICC, through Vice President Kelley, made the policy

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preponderence of all of the relevant evidence convinces us that they are incorrect. Standard Dry Wall Products, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent ICC and ECC assert that the judge was an advocate for a preconceived theory of liability and, in essence, demonstrated bias. After a careful examination of the entire record, we are satisfied that this claim is without merit.

[2]We agree with General Counsel's limited exception to the judge's proposed remedy for the Sec. 8(a)(5) violation, and accordingly extend the period of time for which the employees should be made whole for the unlawful unilateral changes to include the time from the expiration of collective-bargaining agreement until the parties negotiate a new agreement or bargain to a lawful impasse.

decisions for the ICC companies regarding coal, and although ECC was the manager under the written agreement of March 24, 1987, with Hobbs, in practice Kelley directed the operations so as to serve the interests of ICC, ECC, and Hobbs. In further support of the judge's finding that ICC is liable under an agency theory, we note that although the complaint refers to ICC and ECC, ICC filed the answer and signed it ICC; Kelley assigned Blevins, an employee at Inter-Chem, to work at the mine; Hobbs entered into discussions with ICC representatives that culminated in the March 24 management agreement with ECC; after the May 31, 1987 closure of the mine, Hobbs's co-owner, Chulick, met with ICC representatives and reached agreement that ECC would operate as a contract miner; and Blevins contacted ICC's attorney to get advice over the contract dispute regarding Sunday pay.

3. Respondents ECC and ICC contend that they were denied due process because the judge found that the Respondents were joint employers after the closing of the mine based on a theory that they assert was not alleged in the complaint, relying instead on an "unstated theory that the June 4 contract was a sham." We reject this contention and find that the complaint was worded broadly enough to support the allegation that the June 4, 1987 subcontracting arrangement was a sham and that the joint employer relationship continued beyond this date. We note that the Respondents do not now claim that they were precluded from presenting exculpatory evidence, nor do they argue that they would have altered the conduct of their case in any particular. Although Respondents ECC and ICC now claim that they had no evidence of the specific basis to find joint employer after June 4, we note, as did the judge, that Hobbs argued in its brief to the judge that the June contract mining agreement is not a sham transaction to avoid the collective-bargaining agreement or to discriminate against its former employees.

Accordingly, we are fully satisfied that the Respondents

were not denied due process because of the alleged variance between the complaint and the judge's theory for finding joint employer status after June 4, and that the issue of whether a joint employer relationship existed after June 4 was fully litigated.

4. We agree with the judge that the Respondents violated Section 8(a)(3) of the Act by terminating the employees of the bargaining unit on May 31.[3] In so finding, we rely on the strong circumstantial evidence here to establish unlawful motivation. In particular, we rely on Blevins's expressions of blatant antiunion animus, and Sisney's increased displeasure with and condemnation of the collective-bargaining agreement, its restrictions, and the independence it gave the bargaining unit, noted by the judge, prior to the May 31 closing. We find particularly ominous Blevins's comments to Stephens in late May that the "company" would be a lot better off without the Union, and if the men did not want to work the way he wanted them to, "they'd just close it down; close the mine and open it up under a different name and go ahead and dig coal." Although Kelley denies that Blevins spoke with him about his frustrations with the collective-bargaining agreement, the judge discredited Kelley's denial of any pre-June discussion or pre-June agreement for the subcontract, and presumably any talk of

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[3]We also agree that the Respondent violated Sec. 8(a)(5) and (1) of the Act with respect to refusal to recognize and bargain with the Union and repudiation of the contract. Respondent Hobbs argues that these actions should be viewed as a decision to close the mine followed by a subsequent decision to reopen under ECC's management. As the judge correctly reasoned, Otis Elevator Co., 269 NLRB 891 (1984), which Respondent Hobbs cited as authority for the proposition that these were entrepreneurial actions that are subject to the mandatory bargaining abligation, is inapposite when, as here, the actions in question are shown to have been motivated by union considerations. See, e.g. Mid-South Bottling Co., 287 NLRB No. 146, slip op. 3 (Feb. 29, 1988), enfd. 876 F.2d 458 (5th Cir. 1989).

evading the contract. It is clear that toward the end of May 1987 Chulick approached ICC about Hobbs's financial downturn when Kelley turned down Chulick's offer to buy Hobbs. It is also clear that Kelley was aware that Hobbs's financial situation was reaching the critical stage and one option Hobbs had was to close. That some discussion about subcontracting or evading the contract occurred before May 31 is evident from Sisney's comment to Phillip Thomas on May 31 that he should fill out an application and that when the mine reopened it would be "nonunion." Moreover, we rely on Blevins's comments to Dean and Walker after the mine reopened in June that he had done away with the Union as he had always wanted to do, and "we're not going to honor the contract. Now that I've got rid of the Union, I can work whoever I want or whatever for the same wages." Based on the above, we find that the General Counsel made a prima facie case of an 8(a)(3) violation by laying off and refusing to hire the employees, and that the Respondent did not meet its burden of showing that the closing, layoffs, and failure to rehire certain employees would have occurred even in the absence of a union. We note here that Hobbs's co-owner, Chulick, did not testify and infer that his testimony would have been adverse to Hobbs's interest. We find it unnecessary, however, to rely on the judge's further elaboration of what Chulick would have testified to had he been called to testify.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondents Hobbs & Oberg Mining Company, Inc., International Chemical Company and Eastoak Coal Company, Porter Oklahoma, their officers, agents, successors and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(d).

"(d) Offer all bargaining unit employees terminated on May 31, 1987, immediate and full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions. Do this without prejudice to their seniority or any other rights or privileges previously enjoyed. Discharge, if necessary, any employees hired in the interim. Make the bargaining unit employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, and as a result of the repudiation of the collective-bargaining agreement, in the manner set forth in the Board's decision modifying the remedy."

Dated Washington, D.C. January 31, 1990.

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James M. Stephens, Chairman

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Mary Miller Cracraft, Member

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Dennis M. Devaney, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

HOBBS & OBERG MINING COMPANY, INC.,
INTERNATIONAL CHEMICAL COMPANY, AND
EASTOAK COAL COMPANY, JOINT EMPLOYERS

and Case 16-CA-13286

OKLAHOMA COAL MINERS UNION

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R. Michael Lowenbaum, Esq. and with him on brief, Kenneth E. Fleischmann, Esq. (Thompson & Mitchell), St. Louis, MO, for Respondent Hobbs & Oberg Mining Company, Inc.
Thomas F. Birmingham, Esq. and David Weatherford, Esq. (Ungerman, Conner & Little), Tulsa, OK, for the Charging Union.

DECISION

RICHARD J. LINTON, Administrative Law Judge

Statement of the Case

In this joint employer case there are three principal questions. First, were International Chemical Company (ICC) and Eastoak Coal Company (ECC) joint employers with Hobbs & Oberg Mining Company, Inc. (Hobbs) for the period of March to May 31, 1987. Second, were they such for the period of June 1987 and beyond following Hobbs's termination of the bargaining unit on May 31, 1987 and, in early June 1987, Hobbs's subcontracting its coal mining operation at Porter, Oklahoma to ECC. Third, was the motive for the May 31 termination and subsequent contracting out legitimate or unlawful. Finding the answer to be yes as to the first two questions, and that the motive was unlawful, I order the joint employers to reinstate the bargaining unit, to make whole the employees, and to recognize and bargain with the Union.

This case was tried before me in Muskogee, Oklahoma on March 22-23, 1988 pursuant to the October 30, 1987 complaint issued by the General Counsel of the National Labor Relations Board through the Regional Director for Region 16 of the Board.[1] The complaint is based on a charge filed September 10, 1987 by Oklahoma Coal Miners Union (Union or Charging Party) against Hobbs & Oberg Mining Company, Inc. (Hobbs herein) and Inter-Chem Company/Eastoak Coal Company (Respondents). The complaint tracks the format of the charge in naming the respondent parties. I describe them in more detail later. For reasons I explain in a moment, I have modified the style of the case to match the evidence concerning the correct names

[1] All dates are for 1987 unless otherwise noted.

of the companies.

In the complaint the General Counsel alleges that the Respondents, as joint employers, violated Section 8(a)(3) and (5) of the Act on and after May 31 by withdrawing recognition from the Union, terminating all unit employees, temporarily closing the mining operation, and reopening about a week later as a nonunion operation.

Respondent Hobbs filed a separate answer as did International Chemical Company (ICC herein). The complaint names the second respondent as "Inter-Chem Company/Eastoak Coal Company." No answer was filed for that joint name. Nor was an answer filed on behalf of Eastoak Coal Company (ECC). However, if a joint employer relationship is established, then service on one of the joint employers is service as to each. PMS Corporation, 282 NLRB No. 31 fn. 3 (Feb. 3, 1987).

By their answers, Respondents admit certain factual matters, but they deny violating the Act.

On the entire record, including any observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel, Hobbs, and (jointly) ICC and ECC, I make the following:

Findings of Fact

I. JURISDICTION

Hobbs is a Kentucky corporation which mines coal. During the time in question, Hobbs possessed a permit to mine coal from a mine near Porter, Oklahoma. During the 12 months ending May 31, 1987, Hobbs purchased and received at Porter, Oklahoma goods valued in excess of $50,000 from Oklahoma suppliers. Each of the suppliers purchased goods in excess of $50,000 direct from outside Oklahoma.

ICC, an Oklahoma corporation, operates as a trader of

coal and fertilizer products. (2:240-241)[2] During the 12 months ending May 31, 1987, ICC performed services in Oklahoma for customers each of whom sold and shipped goods valued in excess of $50,000 to points outside Oklahoma. In its answer to the complaint, ICC admits it is an employer within the meaning of Section 2(2), (6) and (7) of the Act.

II. LABOR ORGANIZATION INVOLVED

I find that Oklahoma Coal Miners Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

1. Collective-bargaining history

The date is not clear in the record, but at some point in 1985 Hobbs purchased mining permit number 4155 from Bill's Coal Mining Company (Bill's). The permit is to operate a coal mine at Porter, Oklahoma. A coal purchase ("marketing") contract between Hobbs and ICC indicates it was as early as January 1, 1985 that Hobbs took over.[3]

Darrell W. Stephens is a former employee of Hobbs and was a member of the Union's bargaining committee when the collective-bargaining agreement was negotiated. Stephens

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[2]References to the two-volume transcript of testimony are by volume and page.

[3]There are two versions of the coal purchase agreement in evidence. One (GC Exh. 5) bears the January 1, 1985 date. The other (ICC Exh. 2) shows January 30. The parties are unable to determine which date is correct, but the difference is immaterial.

testified that a 3-year contract (effective from January 1, 1985 through December 31, 1987) between Hobbs and the Union was negotiated in January 1985 when Hobbs took over from Bill's (1:72). However, the document received in evidence as the collective-bargaining agreement (CBA) between Hobbs and the Union is for the period of August 9, 1985 to December 31, 1986, and "from year-to-year thereafter," unless terminated on notice. The contract provides that it "shall be binding for a period of three (3) years" from August 9, 1985 (GC Exh. 6 at 24). Clifton E. Walker who, along with Terry Dean, signed the CBA for the Union, dates the event as August 1985 (1:121).

In the CBA between Hobbs and the Union, Hobbs recognizes the Union as the exclusive bargaining representative for employees in the following unit (GC Exh. 6 at 1):

> All production and maintenance employees employed at the Company's mine in the United States, excluding all salaried supervisors, office clerical employees, guards, and supervisors as defined in the National Labor Relations Act, as amended.

Complaint paragraph 10 describes the bargaining unit in essentially the same words, with one exception -- it omits "all salaried supervisors." Because a salaried supervisor is not necessarily a statutory supervisor, I use the description set forth in the CBA.

In its answer to the complaint, Hobbs admits paragraph 11, which alleges:

> 11.
>
> Since on or about August 9, 1985, and

> at all times material herein, the aforesaid Union has been the designated exclusive collective-bargaining representative of the Unit and since said date the Union has been recognized as such representative by Respondent Hobbs. Such recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective by its terms for the period January 1, 1987 until December 31, 1987.

In answer to complaint paragraph 12, Hobbs admits that at all times since August 9, 1985, the Union, by virtue of Section 9(a) of the Act, has been and is the exclusive bargaining representative of the unit for the purposes of collective bargaining.

Clifton E. Walker worked as a welder and mechanic for Hobbs. (1:121-122) Walker testified there were about 35 employees in the bargaining unit when the mine closed in May 1987. (1:131) As Union Treasurer Walker (1:122, 131) and Union Vice President Terry W. Dean (1:154-155) explain, the Union represents (or represented) only the employees of Hobbs at the Porter mine. When Hobbs took over, the Union changed to its current name from the Welch Coal Miners Union when the mine was operated by Bill's. The Welch is a reference to the small town of Welch in northeastern Oklahoma. (Hobbs Exh. 3)

2. The business firms

Hobbs is owned by James F. Hobbs (who is also president), Perk Oberg, and John Chulick, the son-in-law of James Hobbs (2:183). James Hobbs lives in Arizona and Chulick lives in California (2:187).

Eastoak Coal Company (ECC herein) is a wholly owned subsidiary of ICC (1:12; 2:259-260). Although ICC is

commonly known as Inter-Chem (1:145), ICC has a wholly owned subsidiary named Inter-Chem Coal Company (2:288). Occasionally in the record, the parties say "Inter-Chem" when, in fact, they are referring to ICC. In this decision, I reserve the name "Inter-Chem" for the coal company (Inter-Chem Coal Company), and not ICC.

Because it is clear that ICC, the parent organization, and not "Inter-Chem Company" as named in the charge and the complaint, is the correct name of that alleged joint employer (with Hobbs and Eastoak being the other two), I have modified the style of the case to correspond to the undisputed evidence.

The discrepancy in the names is of some significance. At paragraph 2(c) of the complaint, footnote 2, the General Counsel alleges, "hereafter, all references to the Respondent Inter-Chem also refer to Eastoak Coal Company." At the hearing the General Counsel did not move to substitute ICC for the name of Inter-Chem, nor did she move to separate the names of Inter-Chem and Eastoak Coal Company. Consistent with the complaint, the General Counsel states (Brief at 4), "Respondent Inter-Chem as used in the Complaint and in this brief includes International Chemical Company and its wholly owned subsidiary, Eastoak Coal Company."

As already noted, the complaint alleges a joint employer relationship, and it is only under the joint employer theory that liability is alleged. ICC and ECC are not alleged to be a single employer nor alter egos. ICC argues that even if ECC committed unfair labor practices, ICC would have no liability because ICC and ECC "are not considered a single employer . . . ." (Brief at 22.) I address that issue when I begin an analysis of the allegations, the evidence, and the contentions of the parties.

Jim D. Kelley is a senior vice president with ICC. Kelley testified that ICC's principal business is trading fertilizer products, and that it also trades coal. Kelley distinguishes

ICC's trader status from that of a broker by explaining that as a trader, ICC actually acquires title to the goods, sometimes even possession, before selling the goods. ICC also handles some transactions as a broker. When acting as a broker, ICC never acquires title to the goods, but simply receives a commission or fee, for bringing together the buyer and seller for the sale of the goods. Kelley testified that ICC does not mine coal (2:240-241, 288).

Kelley testified he runs ICC's coal division while Wallace Wells, ICC's president, operates ICC's fertilizer division (2:242). In addition to his senior vice president post at ICC, Kelley is president of both ECC and Inter-Chem (2:288).

3. Mining coal at Porter, Oklahoma

a. General mine plans

Porter is a small town a few miles northwest of Muskogee, in the direction of Tulsa. The mine in question lies a half-mile or so south of Porter (1:190). The "mine" has three aspects -- the office area, the pit itself, and the tipple area where the coal is delivered for shipment. The pit, known as the "south pit," is a half-mile to a mile south of the mine office. A shop is situated adjacent to the office. (1:43, 122; 2:211-212, 224.)

The mine is an open pit, or strip mine, and not an underground mine (1:43). The coal itself is "soft" coal, bituminous coal (GC Exh. 5 at 1). The coal has to be analyzed as to quality of content. One important item among the contents is the percentages of sulfur. When the sulfur content exceeds a certain percentage, it is not marketable (1:180).

A vital factor in a coal-mining operation is the general mine plan. As Darrell Wayne Stephens explains, it is the strategy for the best method for getting the coal out of the

ground4. (1:76-77.) As ICC's Kelly explains, the type of equipment used is an important factor. (2:256.) The equipment used depends on the method chosen. Three approaches or methods are described in the record. One is the dragline method. A dragline, as Kelley describes, looks like a crane with a bucket on the end of the cable. The dragline operator throws out the bucket. As the operator pulls the bucket back, the bucket scoops up a load of dirt (or coal). This method is cost-effective in some situations, but not when the dragline must be dismantled, moved, and reassembled frequently. The "overburden" (the dirt and rocks overlying the coal seam) here is up to 60 feet deep (2:254-255).

A second method uses bulldozers (dozers) assisted by scrapers (2:256). A dozer, of course, has a blade on the front and pushes the material. By contract, a scraper scrapes up the material and hauls it (2:192, 256). Although the evidence does not describe a scraper in more detail, it apparently is a piece of equipment with an operator or driver at the front driving. Behind the driver the vehicle can open with a lowered blade. As the vehicle passes over the material to be moved, the driver lowers the blade, the material is scraped into the cargo portion, and the driver hauls the load to the designated unloading spot.

Reversing the equipment mix of the second method, the third method uses scrapers assisted by dozers (2:256).

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[4]Called as a witness by the General Counsel, Darrell Wayne Stephens, who was president of the predecessor union in 1983-1984, had worked as tipple operator at the Porter mine for Bill's, and remained in that position when Hobbs took over in mid-December 1984. In the contract negotiations between Hobbs and the Union, the tipple operator position was removed from the bargaining unit and converted by Hobbs to a salaried position with supervisory status. (1:55-57, 72,95) Whether Stephens was a statutory supervisor was not pleaded or litigated and appears immaterial.

b. The purchase contract and the management contract

In January 1985, Hobbs, as seller, entered into a Coal Supply and Joint Marketing Agreement with AMAX Coal Sales Company (AMAX herein) and ICC, the joint buyer, to sell the joint buyer bituminous coal from Hobbs's Porter mine for the 3-year term of January 1, 1985 through December 31, 1987.[5] (@:243; GC Exh. 5.)

Under the purchase, or marketing, contract, Hobbs had to supply a minimum of 180,000 tons of coal a year, and the coal had to meet certain specified standards of quality. The agreement provided that title to the coal would pass when delivered into trucks or railcars at the Porter mine (GC Exh. 5 at 1-3). The delivery point is called the tipple areas (2:247). As Kelley explains, and the contract discloses, Hobbs would send an invoice to AMAX who sent a copy to ICC who in turn would pay one half to AMAX. Finally, AMAX paid Hobbs the invoice amount. ICC would bill the customers to whom it and AMAX, as joint venturers, sold the coal (2:249).

The contract, a "take-or-pay" contract as Kelley describes it (2:247), was modified in a couple of respects in June or July 1986 (ICC Exh. 3), and again by an undated memo (ICC Exh. 4) which apparently issued in late 1986.

Kelley testified that between January 30, 1985 and January 1, 1987, he visited the Porter mine many times.[6] Initially, Kelley testified, Hobbs employed the dragline method and then later switched to the dozer/scraper method

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[5]As noted earlier, there are two versions of this marketing, of purchase, contract in evidence. The first (General Counsel Exh. 5) recites that the parties entered into the agreement on January 1, 1985, whereas the second (ICC exh. 2) states it was January 30, 1985. The difference is immaterial to us, particularly since the stated 3-year term of January 1, 1985 to December 31, 1987 is the same in both.

[6]Because the January 30, 1985 version of the marketing contract was introduced through Kelley (2:2430, it is possible, if January 1, 1985 is the correct "entered" date of the agreement, that Kelley's first visit was in January 1985.

(2:254-255). Darrell Stephens testified that the switch occurred around November-December 1986 (1:175-76).

Hobbs began experiencing production and financial difficulties in late 1986. Kelley testified that in that time frame, Hobbs reached a point where it could not supply the tonnage requirements of the purchase contract. Shipments to ICC's customers were sometimes disrupted, and the customers complained to ICC. ICC on occasion had to buy coal on the open market, frequently at a loss, in order to meet its commitments. The quality of the coal sometimes fell below the contract's specifications (2;250-253).

Aside from switching its method of extracting the coal in late 1986, as Stephens testified, Hobbs also sought financial relief from the Union. James Hobbs met with the Union to discuss modifying the CBA to that end. The meeting was held at the civic center in Porter in about November 1986 (1:46, 110-111, 116-117). Kelley testified he appeared at the request of James Hobbs and gave a 10 to 15 minute presentation to the Union, and its members in attendance, on the market conditions of the price of coal (2:263- 264). Kelley testified there was tremendous pressure in the market to lower the price of coal. The situation was such as to create some doubt whether the coal could be sold at a profit (2:263).

Whether from market forces or whatever, the late 1986 contract addendum (ICC Exh. 4), which I mentioned earlier, reduced the coal's contract price paid to Hobbs from $32 to $30 a ton. About this same time the November meeting resulted in a CBA modification, dated December 22, 1986, and effective for the year beginning January 1, 1987 (1:156-167; GC Exh. 7). The modification was a substantial concession by the Union. Wage rates appear to have been reduced by about $2 an hour, the wage classifications were reduced to four, and two classifications, including the tipple operator, were removed from the bargaining unit. Vacations were reduced to one (1) week (employees with 10 or more years of service had received 3 weeks of paid vacation). Paid

holidays were cut from 8 to 4. The pension was eliminated, as was a "cost of living" increase apparently planned for 1987.

These were not the only changes Hobbs made to increase production, cut costs, and become more competitive. In late 1986, discussions began between Hobbs and ICC as to what else could be done. Eventually, Kelley testified, these discussions culminated

in a management agreement whereby Eastoak (ECC) would supply much-needed management expertise to Hobbs, particularly as to the extraction method Hobbs was using at the Porter mine (2:252-254, 282). A written management agreement, dated March 24, 1987, and effective to the close of business on December 31, 1987, is in evidence (GC Exh. 4).

The events I have described so far are generally undisputed. At this point, however, controversy begins. It concerns Larry G. Blevins, an employee of Inter-Chem Coal Company, or Inter-Chem (1:139; 2:234). There is no dispute that Kelley assigned Blevins to work at the mine (2:234, Blevins; 2:299, Kelley). There is some discrepancy as to when Blevins arrived, and there is a major dispute concerning his status there and concerning whether he made certain statements at the Porter mine. These disputed matters I shall address in a moment. The March 24 management contract ("Coal Mining Management Agreement") extends to four legal-sized pages. James F. Hobbs signed for Hobbs and Kelley for ECC. The contract recites that the intention of the parties is that ECC will develop a plan of operations, subject to Hobbs's approval, and then use its "best efforts" to implement the plan (Sec. 3(a)). ECC is to exercise such responsibilities as may be delegated to it by Hobbs (Sec. 3(b)). Within 20 days initially, and from time to time thereafter, ECC is to furnish Hobbs with suggestions for operating the mine. "All recommendations relative to labor shall conform to the collective-bargaining agreement, as

amended . . . ." (Sec. 3(c)). The agreement provides that Hobbs will pay a fee to ECC per ton of coal (Sec. 4). Under Sec. 7(d), "Capital and Labor," Hobbs is to provide all operating capital, labor, materials, equipment, and supplies, and "Labor policies shall be effective only if approved by [Hobbs], and shall conform in all respects to the collective-bargaining agreement, as amended," between Hobbs and the Union. Sec. 7(d).

Kelley testified that between March 24 and May 31, 1987, he (for ECC) was the contact with Hobbs. James Hobbs possibly suffered a heart attack around May, 1987, although there are few details in the record (1:51; 2:209). One witness, Terry Wayne Dean, does not recall James Hobbs's becoming ill (1:165). Kelley talked frequently with Jim Hobbs until the latter became ill and thereafter, to John Chulick, on production and finances (2:258-259). On occasion, Blevins would consult directly with James Hobbs or Chulick (2:221, 236, 299).

Before March, 1987, Kelley testified, Hobbs had its own mine plan. In March, ECC, with Hobbs's approval, modified that plan in ways ECC thought the mining operation could be made profitable (2:285). The primary modification appears to have been to change from the dozer/scraper method of extraction to the third method I described earlier, the scraper/dozer. Under the former, the dozers were having to push large quantities of dirt across the pit. With the ground overlay frequently having a depth of 40 to 45 feet, the dozers ended up with a considerable uphill push. Kelley testified, "We saw this [as] being a fatal flaw in the operation and thought that it could be more effectively handled by scrapers picking up material and carrying it as opposed to dozers pushing it." (2:256.)

Barely a week after Hobbs and ECC executed their management contract, and for reasons unexplained in the record, AMAX and ICC dissolved their joint venture. By written agreement dated April 1 (GC Exh. 5), ICC assumed

the full role of the buyer under the January 1985 marketing agreement with Hobbs (2:298-299).

c. The mine closes and reopens

Kelley testified that toward the end of May 1987 the mining operation began to go "downhill." Kelley cites slipping productivity (principally because appropriate equipment was lacking) and an insufficient cash flow (2:266). Hobbs (apparently by John Chulick) approached ICC about the problem and suggested that ICC buy Hobbs. ICC rejected that suggestion because of the large debt structure afflicting Hobbs (2:266). Kelley was well aware that Hobbs's financial situation was reaching the critical stage, and that one option Hobbs had was to close the mine (2:293).

On May 29, Hobbs's attorney, R. Michael Lowenbaum, sent a registered letter (Hobbs Exh. 1), addressed to the "Union President, Welch Coal Miners' Union of Welch, Oklahoma, c/o Hobbs & Oberg Mining Company, Inc., P. O. Box 179, Porter, Oklahoma, 74454." (2:302.) After an opening two-line paragraph announcing that the law firm represents Hobbs, the letter advises:

> Please be advised that effective on or about May 31, 1987, the Company will cease production of coal at the Porter Mine. In connection with the Company's ceasing operations, the Company will terminate the employment of all its employees covered by the above-captioned collective bargaining agreement as of May 31, 1987. Representatives of the Company are and remain ready and willing to meet and confer with representatives of the Union concerning the effects of the Company's decision to cease operation on your membership.

The return receipt (Hobbs Exh. 2) reflects that the letter was delivered to Kelly Bishop on June 1 (2:303). Attorney Lowenbaum testified he does not know a Kelly Bishop and that Hobbs informed him that no one by the name had ever worked for Hobbs (2:304-305).

Terry Wayne Dean became the Union's president in February. Dean testified that although he thinks the P. O. Box 179 address is the address the Union would receive any mail (he testified the Union's secretary would know), he does not recall receiving the letter. Moreover, there was no bargaining over effects, or any request by the Union to do so, because the Union's contract (in his opinion) was still in effect and there was nothing to bargain about (1:170-172). The charge and other service documents for the pleadings in this case show the "P. O. Box 179" in Porter as the mailing address for Hobbs. Testimony confirms that to be the mine's address (2:205, Sisney). The Union gives its address on the charge as Route 2, Box 166A5, Muskogee, Oklahoma, 74401, and that is the address shown on other service documents for the pleadings. There is no identification of Kelly Bishop in the record. I find the evidence to be insufficient to show that the Union ever received Lowenbaum's letter of May 29.

Ronald L. Sisney testified that Jim Hobbs hired him on March 16 to be superintendent of the Porter mine (2:182-184, 202, 208). Sisney testified that in the last week of May, John Chulick told him Hobbs was going to stop mining when all the uncovered coal had been removed. Chulick instructed Sisney to call him when that point was reached. On Sunday, May 31, Sisney called Chulick at 2 p.m. and made that report. Chulick instructed Sisney to park the equipment and to lay off the employees, including himself (1:188, 191). Sisney or other Hobbs's supervisors notified at least some of the bargaining unit that very day or evening (1:98, 106, Thomas; 1:119, Armstrong; 1:151, 163, Dean).

On Sunday, May 31, John Chulick telephoned ICC's

Kelley and informed him of the mine's closing (2:265, 285, 293). Inter-Chem's Blevins was notified that same evening by Ronald L. Sisney (2:233).

That following week, on Monday, June 1, Hobbs (represented by Chulick and attorney Pete Fanchi) approached ICC about the possibility of continuing the business venture in some form. Chulick and Fanchi met with Kelley and Lawrence A. Yeagley. Lasting most of the week,[7] the discussions included proposals by Hobbs, rejected by ICC, that ECC or Inter-Chem purchase the assets of Hobbs or, alternatively, make a major cash investment in the operation. Finally, on Thursday, June 4, the parties agreed that ECC would operate the Porter mine as a contract miner for Hobbs (2:267-269, 272, 283, 295). By interlineation on the first page, and page 8, of the mining contract, ECC's status is expressly labeled "contract miner" and "independent contractor." (GC Exh. 3.) The term of the agreement runs from June 4 until all "merchantable" coal has been removed (GC Exh. 3 at 6). The parties agreed that Hobbs would pay a base price of $26.38 per ton delivered to the tipple site (GC Exh. 3 at 2). Of course, as Kelley testified, Hobbs continued to be obligated under the 1985-1987 joint marketing agreement (GC Exh. 5) (the purchase contract) to sell coal from the Porter mine to ICC[8]. From June 4 forward, however, Hobbs no longer had any obligation (and perhaps no right) to mine the coal (2:283).

About a week after the mine closed, or approximately Sunday, June 7, Kelley, Blevins testified, called Blevins and informed him that ECC would operate the Porter mine as a

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[7]Kelley testified the meetings extended into Friday or even Saturday (2:268).

[8]Kelly actually said "Inter-Chem." (2:283) We know from Yeagley that ICC is commonly known as "Inter-Chem" (1:145). Indeed, the marketing agreement expressly uses "Inter-Chem" to denote ICC (GC Exh. 5. at 1). In short, Kelley was not referring to Inter-Chem Coal Company at this point.

contract miner (2:226-227, 233). During that week, while the mine was closed and Hobbs and ICC were negotiating, Blevins resumed his work at Inter-Chem's mine at Welch, Oklahoma, and engaged in "several" other activities (2:233, 236). When the Porter mine reopened under ECC, Blevins was in charge (2:331). Sisney testified that after the mine reopened under ECC, he reported to Blevins (2:209).

d. Hiring by Eastoak

Terry Wayne Dean was president of the Union during the spring of 1987, and in that time frame, he operated a scraper for Respondent (1:148, 152, 159). Clifton E. Walker has been treasurer of the Union about 6 years. Walker worked as a welder/mechanic for the Respondent (1:121-122).

In the first part of June, Dean and Walker went to the Porter mine, made application to work for Eastoak, and stated that the Union still had a contract. Dean testified he asked Blevins whether "they" were going to honor the CBA. Blevins said, "No, we're not going to honor the contract. Now that I've got rid of the Union, I can work whoever I want or whatever for the same wages." As far as he was concerned, Blevins said, there was no contract with the Union (1:150, 160).

Walker testified Blevins said he had done away with the Union as he had always wanted to do. Walker and Dean asked him what was to be done about the wages and benefits. Blevins said he was going to pay $9 an hour "across the board," that there would be no benefits, and employees would have no holidays but instead, would have to work holidays. Walker asked if Blevins was going to hire him back. Blevins said, "There's no way that I'd hire you." Walker said, "Fine." Walker did not ask Blevins to explain because Walker knew the reason. He and Blevins, Walker testified, had argued. "He didn't like me and I didn't like him." It was over an incident involving a scraper, Walker

testified (1:128-131). I describe the scraper incident later and the subsequent warning Walker refused to accept. Although Blevins does not deny having a conversation with Dean and Walker in early June, he does deny the statements they attribute to him (2:227-228).

Walker testified he was not hired by ECC (1:130). Dean apparently was not offered a job with Eastoak until Sisney did so about the last of July or the first of August (1:167-168). The evidence does not describe the job offered or reflect whether Dean accepted the offer. Only two of the General Counsel's witnesses testified that Eastoak hired them -- Phillip L. Thomas and Michael J. Armstrong.

Thomas testified he was hired by Eastoak in mid-June and worked there as a dozer operator until he was laid off in February, 1988 (1:96-97, 99, 104). When Sisney called Thomas on May 31 and informed him the mine was closing, Sisney told Thomas to fill out an application. Sisney added that the mine would be "nonunion." (1:98.) Armstrong was called about 2 weeks after he applied at Eastoak. Initially, he did not accept because he was already working. About a month later, he told Blevins he was not happy where he was. The next morning, Sisney called Armstrong and hired him to operate a scraper for Eastoak at the Porter mine (1:111-112, 118).

Recall that beginning January 1, by the Union's responding to Hobbs's adverse economic condition, the wages and benefits under the CBA in effect at Hobbs had been reduced substantially. Operating the Porter mine nonunion, Eastoak eliminated either some or all benefits and cut the wages to a flat $9 an hour for all operators. Thomas testified that "some" benefits were eliminated along with the union contract (1:101), whereas Armstrong testified that they did not receive paid holidays and, "We didn't have any benefits." (1:112-113.) By benefits is meant, of course, payments not required by law, for Armstrong concedes that Eastoak paid "overtime" (obviously meaning time and one-

half) after 40 hours of work, but there was no double time on Sundays, "nothing like that." (1:112.)

Complaint paragraph 15 alleges that between "about May 31 and June 2, all but approximately four unit employees filed applications with Respondent Inter-Chem. However, only about 12 unit employees were rehired by Respondent Inter-Chem." Paragraph 17 alleges such conduct was motivated by union animus. ICC argues that the General Counsel "apparently abandoned" these allegations (Brief at 24). In her brief, the General Counsel contends (Brief at 8), "In fact, few of the original crew were rehired, although the exact number is not known." I discuss these contentions later.

B. The Events in Dispute

1. Introduction

Although I have covered a couple of points of disputed facts, and will resolve the disputes later, most of the foregoing description summarizes undisputed facts. The significance the parties attach to those facts are in sharp contrast, however.

The time frame of the background I have given actually extends over to the May 31 closing of the mine by Hobbs and the reopening in early June by Eastoak. The time frame of the events I now describe begins in February with Kelley's assignment of Blevins to the Porter mine and extends, generally, to the mine's closing on May 31.

We are concerned in this time frame principally with the presence and actions of Blevins and the question of whether his words or deeds assist in rendering ICC liable here as a joint employer with ECC and Hobbs. Most of the facts in this time frame are disputed. Generally, I credit the General Counsel's witnesses over those of ICC. The General Counsel's witnesses testified with apparent sincerity and with

a persuasive demeanor in comparison to the witnesses called by ICC.

2. Labor relations

Earlier, I described the March 24 management agreement between Hobbs and ECC (GC Exh. 4). Kelley concedes that he assigned Blevins from Inter-Chem's mine in Welch, Oklahoma to the Porter mine as, in Kelley's words, "our representative on site." (2:269, 299.) By "our," I find Kelley meant ICC and its wholly owned subsidiaries. In effect, Kelley operated the coal division as if ICC, ECC and Inter-Chem are a single integrated enterprise. Blevins confirms that Kelley assigned him there (2:234), and that the purpose was to be an adviser and consultant under the management agreement (2:220, 235-236). As earlier mentioned, Kelley testified Blevins reported directly to him, but on occasion Blevins would speak directly with "Hobbs/Oberg." (2:299.) Blevins concedes he visited the Porter mine once in January and once in February, and he approximates his arrival there, after assignment by Kelley, as late February or early March. He testified he does not know whether the management agreement was written or oral (2:220, 235).

Darrell Wayne Stephens has been a member of the Union over 9 years. He was president in 1983-1984, treasurer for 2 years, and on the bargaining committee when the 1985-1987 contract was negotiated (1:72). Originally a dragline operator for Bill's at the Porter mine, Stephens was promoted to tipple operator when Hobbs took over. That position was removed from the bargaining unit effective January 1, 1987, and James Hobbs told Stephens he would have supervisory responsibilities over coal blending, coal loading, coal sampling, water sampling, parts, and parts purchasing. Stephens attended supervisory meetings thereafter (1:56-57).

Stephens credibly testified that Blevins did come to the

mine in January, and that through February, Blevins appeared more frequently. Blevins said he was there as an adviser. In February, Stephens asked James Hobbs about Blevins's capacity. President Hobbs told Stephens he should obey the instructions of Blevins (1:57-58). Union Treasurer Clifton E. Walker, who worked as a mechanic in the shop adjoining the mine office, credibly testified that in February, Jim Hobbs told him Blevins was the general mine superintendent, and later Blevins told him the same (1:123-124).

Stephens testified that Bill Keele had been the acting mine superintendent for Hobbs. Jerry Grooms was the pit boss for Hobbs. In about early March, apparently, Stephens overheard Blevins tell Grooms he knew a man he thought would make a better mine superintendent than Keele and who would be more capable at managing the men (1:86-87). Stephens's testimony that Ron Sisney became the mine superintendent about mid-March coincides with Sisney's testimony that Jim Hobbs hired him on March 16 (2:182, 202, 206). Sisney concedes he was referred to Hobbs by Blevins (2:207). Sisney testified he had checked with Blevins about 2 weeks earlier seeking work, but Blevins said he had nothing.[9] They had a second conversation and then, apparently on a third occasion, Blevins called Sisney and asked if he would be interested in working for Hobbs. According to Sisney, he said possibly so, and, on his own, went to the Porter mine the next morning. President Hobbs (as it so happens) was in the mine office that day, interviewed Sisney, and hired him (2:207-208). I find that James Hobbs was involved merely as a formality to implement the decision by Blevins to hire Sisney. In effect, James Hobbs served as little more than Blevins's agent.

The following day, Tuesday, March 17, Blevins, Stephens testified, conducted a meeting with the mine's supervisors: Mine Superintendent Sisney, Pit Boss Keele,

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[9]Stephens testified Sisney visited the mine in late February or early March (1:59).

Supervisor Grooms, and Supervisor Stephens. Along with discussing changes to be made in the pit area, Blevins told the four that they were not to tell the employees that "Inter-Chem" was going to be managing the mine's business. As far as the employees were concerned, Blevins said, he was there simply as a representative to make recommendations as an adviser (1:59-60, 81).

Following the management meeting, the employees were called in for a general meeting. At the general employee meeting, Blevins introduced Sisney as the new mine superintendent (1:59-60).

In the weeks thereafter, Blevins testified, he spent 60 percent to 75 percent of his time at the Porter mine, mostly in the office, and the rest of his time at Inter-Chem's mine in Welch (2:223, 236). Sisney testified he spent about 98 percent of his time at the pit where most of the employees worked (2:189-190, 211), that he, Keele, and Grooms (the Hobbs supervisors) are the ones who told the employees working in the pit what to do and how to do it, and that Blevins had no authority to tell employees what to do and did not undertake to do so (2:192-193). Blevins agrees that he had no such authority, and testified that he never disciplined any employees at the mine, and that on one occasion, he recommended to Jim Hobbs and John Chulick that Hobbs eliminate Stephens's position and terminate Stephens, they rejected his recommendation (2:220-221). Sisney testified he reported daily, usually by telephone, to Jim Hobbs and John Chulick on matters pertaining to production and finances (1:186-187, 202). Before June, Sisney testified, Blevins maintained a desk in the office. After May 31, he maintained the same desk, same chair, at the same spot (2:209-210).

Stephens credibly testified that Blevins, in March, told him that he was not needed as much around the tipple area, that they would not need to crush or blend as much coal, and instructed him to spend more time at the pit and relieve Sisney so Sisney could spend more time in the office. A day

or two later, Sisney discussed with Stephens whether Stephens thought he could handle the responsibility of Pit Boss (1:57-58, 83-84). Blevins also had Stephens run errands for him, including picking up money from ICC in Tulsa to cover the Hobbs payroll.

Scraper operator Terry Wayne Dean had been laid off from Hobbs in December 1986 while vice president of the Union. He returned on recall some time in February.[10] Because the Union's president had taken a contract job (outside the unit) with Hobbs, Dean became the Union's president (1:148, 152). His first day back, Dean, as union president, went to the office to check with James Hobbs or Perk Oberg on a general visit. The only person there was Blevins, who told Dean that if there was any union business to discuss from that time on, Dean should talk with Blevins. "Hobbs and Oberg no longer have anything to do with the mine, they're out," Blevins added. Blevins said he was the man Dean should see because he was "running" the job (1:149-150, 166). Blevins denies it (2:228). Dean impressed me as a more sincere witness, and I credit him over Blevins.

Blevins admits to a limited involvement in a discussion with the Union over Sunday pay under the CBA. As Dean (1:150-151) and Walker (1:123-124) explain, in March, the workers complained they were not being paid double time for working Sundays.[11] Dean and Walker confronted Blevins over the issue. Blevins said he would check into it. The next day, a Sunday, Blevins, showing them a copy of the contract,

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[10]On redirect examination Dean testified Sisney was already at the mine daily when he returned from layoff (1:175-176). It appears, however, that Sisney was not hired until March 16. Although I credit the substance of Dean's testimony, he apparently became confused either as to the month he returned or as to whether Sisney was already there.

[11]Item (2) of the CBA modifications that went into effect on January 1 reads (GC Exh. 7):

Forty (40) hours per week straight time, all hours over forty (40) would be time and a half with the exception of Sundays which would be double time.

said that double time would be paid on Sundays only if 40 hours had already been worked that week.[12]

However, Dean testified, the way Respondent was scheduling hours the affected employees would not reach 40 hours until they worked through Sunday, and therefore, they would receive only straight time pay for working Sundays (1:151). Dozer operator Michael J. Armstrong testified that Blevins, who had come to the pit to explain Respondent's position, stated that Respondent had to pay double time on Sunday only if the affected employee had already worked 40 hours that week. Armstrong places the event in early April rather than in March (1:110, 115). The contract modification, quoted earlier, is subject to being interpreted in a way which supports either the Union or the Company.

Blevins concedes he contacted Inter-Chem's attorney, Laurence A. Yeagley, for an interpretation of the CBA, learned that double time did not have to be paid under these circumstances, and so reported to Dean.[13] That ended his involvement, he declares. In fact, Blevins asserts, it was Sisney who came to him with the Sunday pay question (2:229, 238). I credit Dean and Walker.

Aside from instructing a supervisor, Stephens, on what to do and where to work, Blevins also, contrary to his testimony and that of Sisney, became directly involved with supervising the employees. Welder and mechanic Walker, the Union's treasurer, spent about 75 percent of his time in the shop adjoining the office and he normally received his work instructions from Blevins (1:122, 124). On one occasion in late March or April, Blevins wanted Walker to repair a broken part of a scraper by welding the part. Walker told Blevins the part could not be repaired but would have to be

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[12]Dean's testimony is slightly confused on this point, but it seems clear that is the thrust of his words, particularly as it matches the other evidence.

[13]As earlier noted, Yeagley testified he is vice president and general counsel for ICC (1:135).

replaced with a new part. Blevins said he did not want to spend the money or time getting a new part. Walker again told Blevins a repair would not work. Blevins terminated the conversation by telling Walker (1:126): [14]

I'm the boss, and you do what I tell you to do.

Walker repaired it, but, as he had predicted, the part broke almost immediately after the scraper returned to service in the pit. Respondent thereupon sought to issue Walker a written reprimand over the incident (1:126-127).

Sisney testified Blevins was not involved, that it was simply a matter of Walker's incorrectly repairing a part and not checking to see if it would work when the scraper was returned to service. When he sought to hand the warning slip to Walker, Walker refused to take it (2:199-201). Further contradicting Walker, Sisney testified Walker spent more time in the pit, where he performed mechanical work, than he did in the shop (2:211). Blevins describes the time as a 50/50 split (2:224).

Walker testified that Union President Dean was with him when, in the office, Sisney and Blevins wanted Walker to sign a warning which blamed Walker for the part's breaking. Walker refused to sign (1:127-238). Dean confirms he represented Walker (1:150). Walker never filed a grievance over the matter (1:128, 133, 167), apparently because, as Dean testified, he never "received" (by physically accepting in his hand) a warning (1:166). Blevins asserts he never attempted to give a warning to Walker (2:222, 225).

I credit Walker and Dean over Sisney and Blevins. However, Walker used the generalized "they" when describing the actions of Respondent. I find that, although Blevins acted and spoke as Walker described, it was Sisney who did the acting and speaking for Respondent when

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[14] I do not credit Blevins' denial (2:226).

Respondent thereafter sought to have Walker sign the warning. Blevins was present in the office on that occasion, I find, but left the warning for Sisney to handle.

3. Animus

As earlier mentioned, the complaint (paragraphs 15-17, 20) allege that Respondent violated Section 8(a)(3) of the Act by discharging all unit employees on May 31 and rehiring about 12 only (of about 35). The evidence is rather skimpy concerning not only the number of employees rehired in early June and later, but also concerning the number of employees who even applied for employment with ECC when ECC took over in early June.

The record contains evidence either directly reflecting animus or which the General Counsel apparently contends supports an inference of animus. Most of the evidence consists of remarks attributed to Blevins before and after May 31. Earlier, I summarized the statements which, I found, Blevins made in early June. I now cover the pre-June statements attributed to Blevins by Stephens. Blevins denies making the remarks (2:226). I credit Stephens. Testifying with "straight eyes,"[15] Stephens exhibited a more persuasive demeanor.

As Darrell W. Stephens credibly testified, in the period of March-May Blevins discussed the CBA with Stephens in conversations the two held in the office. Blevins would ask for Stephens's interpretation of whether Blevins could move someone from a scraper to a dozer. Blevins would ask Stephens similar questions relating to hours and operation of

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[15]In the American Indian Prayer (Red Cloud Indian School, Pine Ridge, South Dakota), the supplicant, praying to the Great Spirit, "whose voice I hear in the winds," humbly asks for wisdom to guide him through life. He concludes by asking, "Make me always ready to come to you with clean hands and straight eyes. So when life fades, as the fading sunset, may my spirit come to you without shame."

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equipment (1:61-62). By April Blevins began to express his opinion about the CBA to Stephens. After asking about an article in the CBA, Blevins would cast aside the CBA, saying that it would be a lot easier to manage the business without a (union) contract. Blevins said it seemed as though the union contract had restricted the company from operating its business or managing its people as Blevins thought the operation should be managed (1:67).

By May, Blevins's remark to Stephens reflect that Blevins's frustration at not having unbridled leeway in operating the mine had resulted in an attitude that was more than simply negative. Blevins's attitude now became characterized by a threatening overtone. Thus, in late May Blevins told Stephens that the "company" would be a lot better off without the Union, and if the men did not want to work the way he wanted them to, "they'd just close it down; close the mine and open it up under a different name and go ahead and dig coal." (1:68, 70).

Blevins made the close-down reopen threat in conjunction with a dispute with the Union over the handling of explosives. Stephens was assigned to do some blasting of rock. As Stephens had predicted, the Union went to Sisney and protested that if the blasting was going to be done regularly then the job should be posted for bidding under the CBA. Respondent ceased the blasting and resumed digging with the equipment (1:68-70).

Sisney also increasingly began to condemn the CBA in May. This was in conjunction with Sisney's either changing, or wanting to change (the evidence is less than plethoric), the shifts and hours of the equipment operators to two shifts of four days of 10 hours. Apparently, some employees complained (1:87-88). Earlier Sisney also had expressed his desire not to have to pay double time under the CBA for Sunday work (1:88, 124). That issue, as we have seen, was resolved to his and Blevins's liking when ICC's general counsel interpreted the CBA as not requiring double time pay

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on Sunday unless the employee had already worked 40 hours that week.

Sisney's displeasure with the CBA, its restrictions, and the independence it gave the bargaining unit is evident from his failed attempt to change the hours of welder/mechanic, and union treasurer, Clifton E. Walker. Sisney testified that he changed the hours of the mechanics. At one point, Sisney says there were three mechanics (Walker, Olin Johnson, and a third whose name he could not recall) working a 10-hour shift beginning at 7 a.m. (1:193-194, 196). Later Sisney gave the number of mechanics as four, including Ronnie Schoulz, with Johnson and Schoulz being contract employees, Walker and the fourth mechanic being members of the bargaining unit, and the four working two mechanics per shift of four days (and 10 hours) on and four days off (2:213-214). Sisney wanted to stagger the starting times (and, thus, the ending times) in order to provide more maintenance and repair service for the equipment. Walker, Sisney testified, refused to change (2:214-215). Presumably, Walker relied on the CBA or some custom related to the CBA. For classifications, with more than one shift, the CBA defines the shifts and hours, with the first shift beginning at 8 a.m. (GC Exh. 6 at 16). It is unclear, therefore, whether Sisney ever implemented his desired change, at least as to the two contract mechanics, or whether Walker's adamant resistance frustrated Sisney's ability to implement his plan even as to the two contract mechanics. Sisney does not give the approximate date of this incident. Walker does date a group effort by Jim Hobbs, Blevins, and Sisney to persuade him to convert to a contract mechanic. Placing this event in March, Walker testified he declined the invitation (1:131).

4. Financial control

The record contains evidence relating to certain financial matters. Hobbs contends the evidence does not support a

finding that ICC had financial control of Hobbs (Brief at 18). ICC argues that Respondents did not jointly control the mine's finances, and that in any event the evidence is irrelevant because there is no allegation that Hobbs and ICC (and ECC) constitute a single employer or alter egos (Brief at 20).

Respondents did not object to this evidence as irrelevant, and it could be argued that all concepts were fully litigated (tried by implied consent). Nevertheless, the General Counsel expressly states that only the joint employer concept is alleged (Brief at 14). I interpret that to mean the General Counsel disclaims any contention that the concepts of single employer and alter ego were fully litigated. The General Counsel asserts that the Government's allegation, and its position, is that ICC, "through its agents, exerted sufficient control over the employees of Respondent Hobbs to constitute a joint employer with Respondent Hobbs." (Brief at 14). Although that position does not seem to answer the contention of irrelevance ICC raises in its brief, I nevertheless shall summarize the details quickly.

The first item here involves an $18,000.00 check. There is no dispute Blevins sent Stephens to ICC's office in Tulsa to fetch the check and that Hobbs deposited the check in its own bank account in Porter. Stephens testified this occurred in about April and was done, so he was told, that Hobbes could meet its payroll (1:62-63, 70, 82, 84). On a similar errand for Blevins, Stephens went to ICC in Tulsa, obtained a sealed envelope contained a check, carried it to a machine shop that had repaired an engine block for Hobbs, received the engine block, and returned with it to the mine (1:62-63, 84-85).

Testifying about both event, Kelley explained that in both instances the checks represented money owed by ICC to Hobbs for coal delivered and invoiced. Payment was expedited (that is, made in advance of the due date under the contract) merely as a courtesy to Hobbs, and the money was

not an advance or a loan (2:273-278, 281-282). The General Counsel argues that Kelley's explanation does not ring true because the expedited $18,000 does not match with the invoices in evidence (Brief at 15). The problem in resolving this issue is twofold. First, the three invoices in evidence (GC Exhb.10-12) bear March dates and range in amounts from about $4,500 to nearly $35,000. The evidence is insufficient to determine whether these invoices had been paid or not when the $18,000 check was obtained, whether ICC's books reflect the $18,000 was applied to these or similar invoices, or other accounting details. The same is even more true as to the engine block Stephens secured.

Kelley's testimony is rather puzzling on one point. On direct examination Kelley implied that ICC had expedited payment of invoices as far back as 1985 (2:279), but on cross-examination by the General Counsel Kelley specifically states that early payments were made only after AMAX dropped out (2:296-297). That, we know, did not occur until April 1, 1987.

Another financial item concerns road use rental fees. Darrell McCullough owns some important property at the mine -- the road from the mine to the tipple area. When Hobbs fell delinquent in its payments of the rental fees, McCullough closed the road. That action produced results. On May 4 Kelley, Yeagley, and Blevins met with McCullough just west of Porter. They agreed to get McCullough his money. The next day McCullough received one half of the money due him in the form of a check from Hobbs (1:89-94). Kelley did not address this specific incident. Presumably his testimony that all payments to or for Hobbs were for underlying debts owed Hobbs applies. Again, the evidence does not describe ICC's books and accounting entries so that the significance of any money transfer can be evaluated.

5. ICC logo stickers

The records contains evidence about equipment from the ICC companies and the first appearance of large (13 inches by 18 inches) plastic logo stickers placed on the equipment. The logo apparently is used by any of the ICC companies (GC Exh. 2; ICC Exh. 1). Because there is evidence that the equipment was leased to Hobbs (1:138, Yeagley,[16] and because two of the General Counsel's witnesses testified that the sticker logos were not placed on the equipment until after ECC took over in June,[17] find no significance in the evidence even if in fact a few of the stickers were on equipment before May 31.

C. Discussion

1. Introduction

Resolution of the issues must be made at two point -- as of May 31, 1987, and again as of June 4, 1987. As already mentioned, I have resolved credibility in favor of the General Counsel's witnesses. Except where otherwise notes, or where implicit, I find the disputed facts to accord with the General Counsel's evidence. However, that does not necessarily compel the conclusions the General Counsel advances.

2. Some legal concepts

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[16]According to Kelly, Inter-Chem Coal Company had no involvement with Hobbs other than an emergency lease of some equipment on one occasion (2:271). The equipment lease Yeagley Briefly mentions is apparently with ECC.

[17]Phillip L. Thomas (1:00, 105); Michael J. Armstrong (1:111). The logo stickers ICC identified here (2:185) bear the name of Inter-Chem Coal Company (ICC Exh. 1).

The General Counsel alleges (complaint paragraph 5) and argues (brief at 14-19) that Hobbs and "Inter-Chem" are joint employers of the employees of Hobbs. As I have mentioned, the complaint proceeds against Hobbs and "Inter-Chem Company/Eastoak Coal Company." The joinder of the two names in that fashion could suggest a single employer theory, but the General Counsel makes clear that the Government is proceeding only on a joint employer theory. The complaint also expressly designates the name "Inter-Chem" to refer to Inter' Chem Company/Eastoak Coal Company. As we know from the evidence, the actual corporate identity of "Inter-Chem Company" is ICC. Eastoak Coal Company (ECC) is a separate company, although a wholly owned subsidiary of ICC, and Inter-Chem Coal Company is yet a different company, although it also is a wholly owned subsidiary of ICC. I noted earlier, in this decision I have reserved "Inter-Chem" for Inter-Chem Coal Company, except where I quote a witness who, in his testimony, indicates he is referring to ICC.

In its brief ICC refers to the concepts of single employer and alter ego as well as that of joint employer (brief at 20, 22). The three concepts are distinct from one another. Marino Electric, 285 NLRB No. 53, JD slip op. at 16 fn. 29 (Aug. 19, 1987). A brief review of the concepts is appropriate.

The starting point for a clear understanding of the joint employer and single employer concepts, and their differences, is NLRB v. Browning-Ferris Industries, 691 F.2d 1117 (CA 3, 1982) (herein BFI). As the Court in BFI explains, a single employer relationship exists where two nominally separate entities are actually part of a single integrated enterprise so that, for all purposes, there is in fact only a single employer. The question is whether the two firms constitute only one integrated enterprise. BFI at 1122. It is pertinent to note that while diamonds, deficits, and taxes may be forever, corporate arrangements need not be.

Specialty Waste, 269 NLRB 96 (1984) (single employer status only temporary).

In deciding the singular employer question, the Board considers four factors,[18] none of which, alone, is controlling,[19] nor need all be present.[20] Single employer status ultimately depends on all the circumstances of the case,[21] and such status is characterized by the absence of the arm's length relationship found among unintegrated companies.[22] The fundamental inquiry is whether there exists overall control of critical matters at the policy level.[23] The four factors are:[24]

1) interrelation of operations,
2) common management,
3) centralized control of labor relations, and
4) common ownership.

In contrast, as the Third Circuit explains in BFI at 1122, the joint employer concept does not depend on the existence of a single integrated enterprise. Therefore, the four-factor standard is inapposite.[25] Rather, a finding that companies are

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[18]BFI at 1122.

[19]Emsing's Supermarket, 284 NLRB No. 41, slip op. at 3 (June 18, 1987).

[20]Id.

[21]Image Convention Services, 288 NLRB No. 116, slip op. at 8 (May 24, 1988).

[22]BFI, id.: Emsing's, id.

[23]Emsing's, id

[24]Image, id.

[25]BFI at 1122; W. W. Grainger, 286 NLRB No. 8, slip op. at 5 (Sept. 30, 1987). But se Clinton's Ditch Coop. v. NLRB, 778 F.2d 132, 120 LRRM 3562 (CA 2, 1985). Although declining in Clinton's Ditch to adopt a standard applicable to joint employer cases, the Second Circuit weighted five factors which all relate to labor relations: (1) Hiring and firing, (2) Discipline, (3) Pay, insurance and records, (4) Supervision, and (5) Participation in the collective bargaining process. At least two commentators have difficulty seeing any difference in this from the

joint employers assumes in the first instance that companies are what they appear to be -- independent legal entities that have merely chosen to handle jointly important aspects of their employer - employee relationship. BFI at 1122.

In joint employer situations, it is a matter of determining which of two, or whether both, respondents control, in the capacity of employer, the labor relations of a given group of workers. BFI at 1122-1123. Thus, the joint employer concept recognizes that the business entitles involved are in fact, separate, but that they share or codetermine those matters governing the essential terms and conditions of employment. BFI at 1123; Chesapeake Foods, 287 NLRB No. 43, slip op. at 6 (Dec. 16, 1987). W. W. Grainer, 286 NLRB No. 43, slip op. at 6 (Sept. 30, 1987).

To establish joint employer status, there must be a showing that the alleged joint employer meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision and direction. Chesapeake Foods, id. at 7. But the right of sufficient control over the labor relations policies of a contractor may well be a determining factor by itself in concluding that the owner is in fact an employer of the contractor's employees. Cabot Corp., 223 NLRB 1388 (1978), affd. sub nom. Chemical Workers Local 483 v. NLRB, 561 F.2d 253 (CA DC. 1977). Finally, the burden of proving joint employer status is on the General Counsel.

Alter ego status, a separate concept, is mentioned in passing by one of the parties,and I shall treat it briefly. The alter ego analysis considers the four factors of the single employer inquiry and more. The focus of the alter ego analysis is to determine whether one firm is simply the disguised continuance of another firm. Marino Electric, 285 NLRB No. 53, JD slip op. at 16-17 (Aug. 19, 1987).

Board's test. W. V. Siebert and N. D. Webb, Joint Employer, Single Employer, and Alter Ego, 3 The Labor Lawyer 873, 881 (No. 4, Fall 1987, ABA).

Typically an alter ego is established for the purpose of evading (through a sham transaction or technical change in operations) the original employer's responsibilities under the Act, such as it may have under a collective-bargaining agreement with a union. Marino, id. at 17-18; Watt Electric Company, 273 NLRB 655, 658 (1984).

3. Analysis

a. The joint employer issue

During the spring of 1987, did ICC and ECC "meaningfully" affect the employment relationship? I find the answer to be, yes.

Jim D. Kelley, vice president in charge of ICC's coal operations, is also president of ECC and president of Inter-Chem Coal Company. Regardless of whether a single employer status was litigated as to ICC, ECC, and Inter-Chem, it is clear that ICC, through Kelley, made the policy decisions for the ICC companies regarding coal. Although ECC was the manager under the written agreement of March 24 with Hobbs (GC Exh. 4), in practice Kelley directed the operations so as to serve the interests of ICC as well as the interest of ECC and Hobbs. In so doing, Kelley assigned Larry G. Blevins, an employee of Inter-Chem Coal Company, to serve at the Porter mine. Ostensibly Blevins went merely to serve as an adviser and consultant. In fact, however, Blevins went as the general mine superintendent. James Hobbs and Blevins both said so, and the conduct of all parties demonstrates that it was so.

For example, in February James Hobbs told Supervisor Darrell Stephens, to obey the instructions of Blevins. In March Blevins was instrumental in having James Hobbs hire Sisney as the mine superintendent. On March 17, the day after Sisney was hired, Blevins told all supervision, including Sisney, that "Inter-Chem" was now managing the mine, but

not to tell the employees that fact (he also informed them of changes to be made in the pit area). This meeting was followed immediately by one with the employees at which Blevins (rather than James Hobbs, Perk Oberg, or John Chulick) introduced Sisney as the new mine superintendent.[26]

Also in March Blevins reassigned Supervisor Stephens so that Stephens would spend more time in the pit relieving Sisney so Sisney could spend more time in the office, and informed the newly returned Terry W. Dean, now the Union's president, that Blevins was "running" the job, that Hobbs was out, and to see Blevins on any union matter. Even allowing for some exaggeration or puffing in the "out" as to Hobbs, it is a fact that none of the three principals of Hobbs was seen at the mine after march until Chulick arrived in late May. Kelley, however, testified that he visited the mine every week, daily in some weeks, to confer with "our representative" at the site, Larry Blevins, between March and the end of May (2:269-270).

Blevins personally supervised welder-mechanic Clifton E. Walker. In either March or April when they disputed whether a scraper part should be replaced (Walker) or repaired (Blevins), Blevins told Walker "I'm the boss" and to repair it. When the repair item failed, as Walker had predicted, Blevins and Sisney called Walker into the office to give Walker a written reprimand. Although Walker refused to accept the document, the significance of the warning incident is Blevins' personal involvement in the disciplinary process. Similarly, in March Blevins participated with James Hobbs and Sisney when the three unsuccessfully tried to persuade Walker to convert to a contract welder-mechanic.

Again in March, Blevins personally handled the Sunday

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[26]Recall from Sisney's testimony that it was only the day before that James Hobbs, at the mine office, hired Sisney. No reason is suggested in the record as to why James Hobbs, if he in fact was at the mine on March 16, would not have stayed until the next day and introduced Sisney.

pay matter. After obtaining a favorable (to management) interpretation of the CBA from Yeagley, ICC's general counsel, Blevins notified Dean and the other employees that there would be no double time pay on Sundays unless they had already worked 40 hours that week.

On May 4, Blevins was among the ICC group (Kelley, Yeagley, and Blevins) which met with landowner Darrell McCullough when McCullough closed the road to the tipple over nonpayment by Hobbs of the road rental fees. No one was present from Hobbs, not even Sisney. It is true that this example, as some of the others, show Blevins more at the policy or managerial level then at the pit level directly supervising equipment operators, granting them time off, approving vacations, and such matters. But that is why he had Kelley replaced and Sisney brought in. Sisney was handpicked by Blevins for that function. Blevins served at the top, just under Kelley. Joint employer status is not limited to the routine matters of supervision, but includes the policy level that controls the mundane affairs of the pit level. This is implicit in the concept of meaningfully affecting the essential terms and conditions of employment of the workers.

In April Blevins was becoming exasperated with the Union and began commenting to Supervisor Stephens about how it would be easier to manage the mine without a CBA. By late May, Blevins' frustration with the restriction (in his view) of the CBA took on an ugly tone. He now threatened that the "company" would be better off without a union, and if the men did not want to work the way he wanted them to, "they" would close down the mine, open up under a different name, and proceed to dig coal. Kelley denies that Blevins spoke to him about restrictions of the CBA (2:200). I do not credit Kelley, and I find that Blevins and Kelley did discuss such "restrictions."

I find that Blevins' threatening attitude was not solely a spontaneous expression of his personal frustration, but reflected the views of Kelley and Hobbs' John Chulick. By

late May Chulick was the contact person at Hobbs. He came to the mine in late May, gave Sisney the timing on when to cease mining, and the first week in June he (with his lawyer) negotiated the mining contract with ICC. Chulick did not testify. Drawing an adverse inference from his failure to testify, I infer that had he testified, and truthfully, he would have testified that no later than late May he began discussions with kelley and Blevins about the feasibility of escaping the CBA by subcontracting the mining to ICC or one of its wholly owned subsidiaries. Although Kelley denies any pre-June discussion or pre-June agreement for a subcontract (and presumably denies any talk of evading the CBA), I do not credit his denial (2:291-292). Except for routine details pertaining to the coal market, Kelley did not testify with a favorable demeanor, and I do not believe him. He impressed me not as sincere, but as clever. Sisney also knew that Respondents planned to reopen nonunion. Thus, when Sisney called dozer operator Phillip L. Thomas on May 31 to tell him the mine was closed, Sisney invited Thomas to submit an application when the new company reopened the mine, and that it would be operated nonunion (1:98-99)

ICC attaches to its brief a copy of Island Creek Coal Company, 279 NLRB No. 116 (May 7, 1986) in which no joint employer relationship was found between a coal mine operator (ICCC) and an independent contractor (LMC) whom ICCC was hired to perform various items of construction work at the mine site. Missing from that case is the pervasive control that Blevins exercised at the management level here. No did ICCC become involved in incidents of discipline (Walker) or contract administration (Sunday overtime pay) as did Blevins. Blevins told all supervision that "Inter-Chem" would be managing the mine. No similar announcement was made in Island Creek. Although more of the routine matters of alleged supervision were involved in Island Creek than here, General Mine Superintendent Blevins, as I have described, caused Sisney to

be hired as the mine superintendent to handle those matter. I shall not list all the differences, but I find Island Creek substantially different on the facts.

If it can be said that Hobbs retained control and discretion under the written management agreement over matters affecting its employees, as Hobbs argues (brief at 8), it also can be said, and I find, that in fact and practice Hobbs relinquished the lion's share of that control to ICC and ECC from March (February, actually) through May 1987. During that March-May period, therefore, I find that ICC and ECC were joint employers with Hobbs of the employees in the recognized bargaining unit.

As for the period after May 31, the complaint alleges, in paragraphs 15 and 17, that Respondents were unlawfully motivated in refusing to rehire a majority of the bargaining unit in June.

Complaint paragraph 18 alleges that since May 31 "Respondents" have refused to bargain with the Union by withdrawing recognition from the Union and repudiating the CBA.

Complaint paragraph 19 alleges that since June 8 "Respondent Inter-Chem" has operated the Porter mine "on behalf of Respondent Hobbs as a non-union operation" and has unilaterally changed wages, hours, and terms and conditions of employment of unit employees by refusing to give effect to the CBA. Complaint paragraph 21 alleges that conduct to be a violation of Section 8(a)(5) of the Act.

Hobbs argues that after May 31 its status respecting the mine is merely that of an "absentee owner" (brief at 18, 28). With its direct relationship severed from June on, Hobbs argues, even if it were considered a joint employer up to May 31, that status ceased to exist thereafter because it terminated its employees on May 31 and thereafter subcontracted the mining operation to ECC. (Brief at 18, 21.)

Respecting the time frame of June and later, ICC and ECC argue that the complaint does not specifically allege

successorship, that any such claim was not litigated, and that the evidence does not establish such (brief at 25).

In the Government's brief the General Counsel does not expressly address the period of June and alter. The General Counsel's theory of joint responsibility after May 31 by Hobbs and "Inter-Chem/Eastoak Coal Company" is stated without expressly addressing the fact Hobbs subcontracted the mining to ECC beginning June 4.[27]

Hobbs argues that the June contract mining agreement, the subcontract, is not a sham transaction to avoid the CBA or to discriminate against its former employees (brief at 26). In their brief, ICC and ECC suggest that for them to be liable they would have to be shown to be a single employer or as an alter ego was not alleged (brief at 20, 22).

The General Counsel argues joint responsibility by a theory of agency. Thus, "The Complaint alleges that Respondent Inter-Chem, through its agents, exerted sufficient control over the employees of Respondent Hobbs to constitute a joint employer with Respondent Hobbs." (Brief at 14.) And, "If one company functions as the agent of another, pursuant to a management agreement, then they are joint employers if they share or co-determine matters governing the terms and conditions of the employees." (Brief at 17.) The agency argument is expressed without distinction as to the time frame, although the reference to the management agreement clearly pegs it to the March-May time p eriod. But as the General alleges and argues responsibility by Hobbs, ICC, and ECC jointly, both before and after May 31, it is clear that the Government relies on its agency theory to fix responsibility of all three firms for the entire time frame of both before and after May 31. The

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[27]Counsel did not attach a proposed order to the General Counsel's brief. However, in the notice to employees counsel did attach, the employers designated to sign reflect the General Counsel's joint employer theory, with signature lines for both Hobbs and "Inter-Chem/Eastoak Coal Company."

General Counsel cites and relies on cases such as Union Carbide Building Co., 269 NLRB 144 (1984).

The General Counsel neither expressly alleges nor argues a sham transaction. In the absence of alleging and arguing a sham transaction, or single employer or alter ego,[28] how does the government fix liability on all three entities after May 31 and the June 4 subcontract? The General Counsel's articulated theory is responsibility as joint employers without explicit reference to a sham transaction.

The General Counsel's unstated premise apparently is that Hobbs remains in the picture because it is still the owner of the mine permit. Hobbs did not sell the mining permit to ICC or ECC. Thus, the theory apparently runs, ECC became the mining contractor as Hobbs' agent. Even assuming the agent net snares ECC, what about ICC? ICC argues that even if ECC is found to be a joint employer with Hobbs, ICC has no liability because there is no allegation it is a single employer or alter ego with ECC (brief at 20 fn. 3, 22).

Hobbs views the General Counsel's position as an attempt to buttress the joint employer theory by arguing that Respondents acted in collusion to shut down the mine, terminate union members, and repudiate the CBA. Hobbs argues that it acted for non-discriminatory reasons (brief at 22), and contends that the contracting out of the mining operation was not a sham transaction to evade the CBA or to discriminate against its employees (brief at 26, 30). Hobbs contends on brief that it ceased its mining operations and contracted (subcontracted") the work to ECC "because of

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[28]Toward the end of the Government's argument on brief, when liability is attributed to Respondents for "transference of the mine, discharge of the employees and subsequent failure and/or refusal to rehire said employees is violative of the Act" the General Counsel cites McAllister Brothers, 278 NLRB 601 (1986). In McAllister the Board found the companies involved to be alter egos and a single employer. Because our case is premised on liability as joint employers, McAllister is imapposite.

factors unrelated to labor costs," citing Otis Elevator Company[29] and Milwaukee Spring Division.[30] In any event, Hobbs argues, even assuming the decision to shut down turned on labor costs, the Union waived the right to bargain over the issue by virtue of either language in the contract or the failure of the Union to request to bargain over the effects of the decision after being given "proper" notice of that decision (brief at 28-30).

As to the latter, I find no waiver. The notice was sent too late to have permitted bargaining before the May 31 terminations, and the credited evidence is that the Union never received the notice. Moreover, it is ironic that Hobbs after-the-fact devotes much space and energy in contending the Sisney was Hobbs' representative at the Porter mine, yet Hobbs did not see fit to have Sisney -- the person on the scene rather than at an office in St. Louis -- notify the Union representatives of the decision to close the mine and offer to bargain over the effects.

Hobbs' contractual waiver argument is based on art. II, sec 2.3 of the CBA, the "management rights" article (GC Exh. 6 at 2). Hobbs expressly relies on the language reserving to itself the sole right to "subcontract work and . . . determine the number, scheduling and duration of shifts; establish, change, modify or abolish materials, processes, products, equipment and operations, including the right to terminate, merge, or sell the business or any part thereof; . . . ."

However, the omitted portion of the subcontracting clause reads, "subcontract work and arrange for work to be done outside the plant by others or by other divisions, departments or affiliates of the Company; . . . ." The full

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[29]269 NLRB 891 (1984) (Otis Elevator II).

[30]265 NLRB 206 (1982) (finding no waiver by the union of the right to bargain over a decision to relocate). In Milwaukee Spring II, 269 NLRB 601 (1984), the Board, Member Zimmerman dissenting, reversed Milwaukee Spring I and dismissed the complaint.

clause is ambiguous, for it can be read to mean only portions of unit work, such as repairs to equipment, not the entire work of the unit. Even if it plausibly can be read to mean the entire unit, plausibility does not satisfy the established requirement that waiver of a statutory right must be clear and unmistakable. Collateral Control Corporation, 288 NLRB No. 41, slip. op. at 9, fn. 18 (Mar. 31,1988).

But was Hobbs required to bargain with the Union over its decision to contract out its mining operation? If the decision turned on labor costs, apparently so under Otis Elevator II. Why did Hobbs decide to contract out its mining operation? Unfortunately, neither James Hobbs, perk Oberg, nor John Chulick testified. Hobbs, on brief, offers as one reason (the decision) the poor health of James Hobbs. Although it appears James Hobbs had a heart attack in the late spring, there is no evidence he did not recover sufficiently to oversee the mining, or to testify, if he so desired. Moreover, even before his heart attack, James Hobbs stopped visiting the mine after March, leaving the on-site management and supervision of the mine to Blevins and Sisney.

There is a lot of indirect evidence that Hobbs was suffering financially. ICC's Kelley testified regarding problems Hobbs was having with cash flow, credit, and equipment availability. But it appears labor costs were a key factor in Hobbs' financial difficulty. With kelley's help, James Hobbs persuaded the union, at mid-term of the CBA, to agree to a substantial labor cost reduction effective January 1, 1987. The record also reflect that Blevins (and, as I have found, Kelley and Chulick) wanted to convert the mining operation into a nonunion venture because he viewed the CBA as too expensive and restrictive. We also know that when ECC began hiring in June under the June 4 mining contract that benefits were eliminated and wages were cut even further.

If I were to find that Hobbs' decision to close the mine

was motivated by economics, and not by a desire to operate nonunion, I would find that the decision to cease operating its Porter mine and to subcontract the mining operation to ECC turned on labor costs -- a matter over which the Union had substantial control and which was amenable to resolution through collective bargaining. Hobbs made no attempt to notify the Union of its decision and to give the
Union the opportunity to bargain about the decision.

The General Counsel's complaint does not expressly refer to the subcontracting, nor does the General Counsel's brief. Indirectly, however, the Government attacks the subcontracting. First, the complaint alleges animus motivated the joint employers to discharge the unit employees on May 31. Although the usual allegation of a failure to rehire is missing, the failure to rehire concept seems to be included in the Government's joint employer theory of a continuing existence through the joint employer status, and the General Counsel argues on brief that union animus motivated the failure to rehire (brief at 18, 19). I treat the animus allegation in a moment.

The second indirect attack is the allegations that the joint employers have refused to bargain with the Union since may 31 by withdrawing recognition from the union and repudiating the CBA (complaint paragraph 18), and since "June 8" by "Inter-Chem" operating the Porter mine "on behalf of Respondent Hobbs as a non-union operation and has unilaterally" changed wages, hours, and terms and conditions of employment, and has refused to give affect to the CBA (paragraph 19).

In effect the General Counsel, as Hobbs clearly recognizes, is relying on an unstated theory that the June 4 subcontract is a sham in order to joint the March-May period to the June period and to bind Hobbs, ICC, and ECC as joint employers for the June (and beyond) period as well as the pre-June period. For it the subcontract were a legitimate, arm's length arrangement between Hobbs, as the permit

owners, and ECC, an independent contract, then neither Hobbs nor ICC would be a joint employer with ECC after May 31. Any remedy then would lie only as to Hobbs for failing to bargain over the decision to subcontract, although the remedy might include requiring Hobbs to cancel the subcontract. The question to address now is the animus issue.

b. The allegation of unlawful motivation

(1) The May 31, 1987 discharge of all unit employees

In view of my findings regarding the motivation of Blevins, Sisney, and Kelley, with Hobbs being jointly responsible, I find that indeed the subcontract was a collusively inspired device to evade the CBA and to get rid of the Union. All three Respondents participated in this conspiracy to get rid of the Union and the CBA so that all three could benefit from the permit granted by the public (through the State of Oklahoma) to mine the coal.

Because ICC and ECC were joint employers with Hobbs in the February-May period, all are responsible for the animus expressed by Blevins. Indeed, I have found that Blevins' expressions simply mirror the opinion expressed to him by Kelley and Chulick. In April-May Blevins expressed his desire to operate nonunion. I have found that Kelley and Blevins did recommend to Hobbs (Chulcik) that it contract out the mining operation to get rid of the Union, and that Hobbs (Chulcik) adopted the recommendations. I therefore find that a motivating reason for Respondents' closing the mine and terminating the employees was to eliminate the Union.

I also find that Respondents have not demonstrated they would have taken this action even in the absence of the Union and the CBA. Indeed, had Hobbs been free of the CBA, and free to cut the pay of the operators to $9 an hour

with no fringe benefits, the evidence just as strongly suggest s that Hobbs would have continued to operate the mine as it does that Hobbs would have subcontracted the mining operation to another in any event. Accordingly, I find that the three Respondents (Hobbs, ICC, and ECC) violated Section 8(a)(3) and (1), as alleged in complaint paragraph 16, by terminating the bargaining unit on May 31, 1987.

Relying on the concept that certain conduct "inherently" discourages union membership, the General Counsel cites a case for the proposition that a person is held to intend the foreseeable consequences of his conduct (brief at 18). If by "inherently" the General Counsel refers to the principle that certain conduct is "inherently destructive" of important employee rights and requires no proof of antiunion motive to prove a violation of the Act, I find it necessary to pass on the applicability of that principle here.[31] However, in one recent case the Board did apply that principle when it found that the purpose of plan closures and reopenings was to evade obligations under a CBA. Swift Independent Corporation, 289 NLRB No. 51 slip op. at 18 (June 29, 1988).

(2) The June 1987 failure to rehire

Complaint paragraph 15 alleges that between May 31 and June 2 all but approximately four unit employees filed applications "with Respondent Inter-Chem. However, only about 12 unit employees were rehired by Respondent Inter-Chem." Respondents deny the allegation. (Paragraph 17 alleges improper motivation for that action, and paragraph 20 alleges the action to be a violation of Section 8(a)(3) and (1) of the Act.) The presence of this allegation is somewhat puzzling given the General Counsel's joint employer allegations and theory. That is, the remedy for the unlawful

[31] See the Board's discussion of NLRB v Great Dane Trailers, 388 U.S. 26 (1976), in Century Air Freight, 284 NLRB No. 85 slip op. at 5-8 (June 30, 1987) (a single employer case).

discharge of the group is to reinstate the group. If respondents chose to rehire some of the discriminates, that action does not absolve it of the responsibility to reinstate all. Nevertheless, I shall discuss the allegation.

The evidence fails to show how many Hobbs' employees filed applications with ECC or how many of such applicants ECC hired. The evidence shows that some applied and that at least a few were hired. On an individual basis, I find that a moving reason Blevins did not hire Terry W. Dean and Clifton E. Walker was their union capacities and expressions. Blevins did call Dean some 2 months later, but by then the damage had been done to the Union. Blevins did not testify as to why he did not hire Dean in June. I find a violation as to the failure to hire Dean.

As for Walker, it possibly is true, as Walker speculated at the hearing, that Blevins did not hire him because they had experienced conflict (1:130-131). However, much of that conflict arose, I find, from Walker's reliance on the CBA as protecting his work schedule. I find the General Counsel's evidence to establish a prima facie case. As Respondents offered no evidence as to why it did not hire Walker, Respondents, I find did not meet their burden of proof. I therefore find the failure to hire Walker to violate Section 8(a)(3) and (1) of the Act, as alleged.

Because the mining subcontract is tainted by the collusion of the three Respondents to defraud the bargaining unit members of their statutory and contractual rights, the subcontracting device does not serve to sever the joint employer relationship. finding, therefore, that the joint employer relationship remained intact after May 31, I also find that the joint employers, as alleged, violated Section 8(a)93) and (1) of the Act when they, acting through their agent ECC, rehired only some of the bargaining unit in June. As the remedy for the unlawful termination of the entire bargaining unit encompasses the relief for this violation, no additional remedy need be ordered.

c. The refusal to bargain allegations

(1) Complaint paragraph 18

I have found the Respondents conspired to enter a subcontracting arrangement whereby Hobbs could evade the CBA and ICC and ECC, as ostensibly good faith independent contractors, would not be bound by the CBA or have to recognize the Union. I now find that, since May 31, Hobbs, ICC, and ECC, as joint employers of the recognized bargaining unit, have unlawfully refused to recognize and bargain with the Union by withdrawing recognition from the Union and repudiating the CBA, all as alleged in complaint paragraph 18, and all in violation of Section 8(a)(5) ad (1) of the Act.

(2) Complaint paragraph 19

Complaint paragraph 19 alleges, in effect, that ICC and ECC, since early June have operated the Porter mine nonunion as the agent of Hobbs, an have made unilateral changes.

The evidence supports the allegation. I have found that the contracting out was a sham, that it was for the illegitimate purpose of eliminating the Union. The second step in the conspiracy was to erect a documentary device to insulate the parties from responsibility for their collusion. By subcontracting the operation through ICC to ECC, Hobbs appointed them its joint agent not simply to operate the mine, but to implement the illegal scheme. Respondents ICC and ECC moved promptly to make unilateral changes in the wage rates and benefits the employees had enjoyed under the CBA. In so doing, the three firms violated Section 8(a)(5) and (1) of the Act as alleged.

Otis Elevator ii, cited and relied on by Hobbs, does not

apply because here the subcontracting was unlawfully motivated. Airport Distributors, 280 NLRB No. 91, JD slip op. at 26 (June 30, 1986). In any event the change here did no effect a fundamental change in the nature of this business. At all times Hobbs has been the owner of the mining permit. Before February-March it also operated the mine. From February-March it technically operated the mine, but under a management contract which, in practice, gave ECC (and ICC) the lion's share of the right to control operations at the mine. Finally, on May 31 Hobbs took the additional step of closing this operation as a prelude, I have found to the subcontracting device.

Hobbs remains in the business of mining coal through its agent, and joint employers, ICC and ECC. Hobbs did not sell its mining permit, and it merely leased its equipment to ECC. Through the sham subcontracting device, Hobbs simply substituted a second set of employees (those hired by ECC) fir the first set (the recognized bargaining unit).

I find that ECC began on June 4, 1987 to operate the Porter mine as the agent of both Hobbs and ICC, and constituted a joint employer along with Hobbs and ICC in the clever, but illegal, scheme to defraud the bargaining unit employees of their statutorily protect rights to union representation and to the benefits of their CBA[32] that the Respondents, as alleged in complaint paragraph 19, have unilaterally changed wages, hours, and working conditions and refused to give effect to the CBA, all in violation of Section 8(a)(5) and (1) of the Act.

Conclusions of Law

1. Hobbs, ICC and ECC each is an employer within the meaning of Section 2(2)(6), and (7) of the Act.

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[32]"Fortunately for everyone, the plan failed, as Clever Plans do, sooner or later." B. Hoff, The tao of Pooh at 37 (1982).

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of Respondent Hobbs constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All production and maintenance employees employed at the Company's mine in the United States, excluding all salaried supervisors, office clerical employees, guards, and supervisors as defined in the Act.

4. At all times since August 9, 1985, the Union has been, and is, the exclusive representative of all the employees in the unit described above for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. Since February 1987 Hobbs, ICC and ECC have functioned as joint employers and are joint employers of the employees in the bargaining unit, described above, employed at Hobbs' mine at Porter, Oklahoma.

6. By terminating the employees of the bargaining unit, described above, at Porter, Oklahoma on May 31, 1987, Hobbs, ICC, and ECC, as joint employers, violated Section 8(a)(3) and (1) of the Act.

7. By refusing to rehire Terry W. Dean and Clifton E. Walker by mid-june 1987 at the Porter, Oklahoma mine, joint employers Hobbs, ICC, and ECC violated Section 8(a)(3) and (1) of the Act.

8. By refusing since May 31, 1987 to recognize and bargain with the Union as the exclusive collective bargaining representative of the employees in the bargaining unit at the

Porter, Oklahoma mine, by withdrawing recognition from the Union, and by repudiating the collective bargaining agreement (CBA) of 1987, joint employers Hobbs, ICC, and ECC have violated Section 8(a)(5) and (1) of the Act.

9. By operating the Porter, Oklahoma mine since June 4, 1987 on behalf of Hobbs as a nonunion operation, and by thereafter unilaterally changing wages, hours, and terms and conditions of employment of employees in the bargaining unit by refusing to give effect to the 1987 CBA, joint employers Hobbs, ICC, and ECC have violated Section 8(a)(5) and (1) of the Act.

10. The unfair labor practices found affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondents have engaged in certain unfair labor practices, I find it necessary to order them to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Because the subcontracting arrangement here, as I have found, was unlawfully motivated, I shall order Respondents to revoke it, if the Union so requests. I shall order revocation only at the Union's request because the Union may prefer to include that subject in its bargaining with the joint employers. So long as the joint employer relationship last, ICC and ECC must recognize and bargain with the Union regarding wages, hours, and terms and conditions of employment affecting the bargaining unit.[33] Hobbs, of course, remains obligated to recognize and bargain with the

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[33]If all the coal has been mined from the pit involved in this case, and the joint employers have carried their relationship, and the work of the bargaining unit, to another pit, then the joint employers' duty to recognize and bargain with the Union remains.

Union even if the joint employer relationship with ICC and ECC is or has terminated.

Respondent must also offer all bargaining unit employees terminated on May 31, 1987 at the Porter, Oklahoma[34] mine, immediate and full reinstatement to their former jobs at the porter, Oklahoma mine,discharging, if necessary, any other hired into and holding those positions, or, if their jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them[35]. Backpay shall be computed in the manner established in F. W. Woolworth Co., 90 NLRB 289 (1950), with interest calculated as prescribed in New Horizons for the Retarded, 283 NLRB No. 181 (May 28, 1987).[36] See general Isis Plumbing and Heating Co., 138 NLRB 716 (1962).

Although the CBA expired at the end of 1987, the employees would have enjoyed certain benefits under the CBA until its expiration. Respondents therefore must make whole the bargaining unit employees for the value of the benefits denied them the last 7 months of 1987. For those employees who were rehired by ECC, they must be made whole for the loss of pay and benefits they would have received under the CBA in the manner set forth in Ogle

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[34]If the joint employers have ceased mining for coal at the Porter, Oklahoma mine involved here, and have carried their joint employer relationship, and the work of the bargaining unit to another mine, the reinstatement obligation attaches at the new location.

[35]Identity of all members of the bargaining unit, and their addresses, are among the matters which may be determined at the compliance stage.

[36]Under New Horizons, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. Sec. 66221. Interest accrued before Januaryl, 1987 (the effective date of the amendment) shall be computed as in Florida Steel Corp., 231 NLRB 651 (1977).

Protection Service, 183 NLRB 682 (1970).[37] There do not appear to have been any contractual trust funds. However, that can be fully determined in compliance. If there are any such funds, the amounts owed for the contributions not paid are to be calculated in accordance with Merryweather Optical Co., 240 NLRB 1213 (1979).

No additional remedial order is needed respecting the unlawful refusal to rehire Terry Wayne Dean, Clifton E. Walker, and all members of the bargaining unit in June 1987 because any remedy is subsumed in the order to reinstate them and to make them whole for their unlawful termination on May 31, 1987.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended Order:[38]

ORDER

Respondents Hobbs, ICC and ECC, their officers, agents, successors and assigns, shall

1. Cease and desist from

(a) Discharging, refusing to rehire, or otherwise discriminating against employees because they are represented by Oklahoma Coal Miners Union (the Union) or any other labor organization, or because they avail themselves of the protection afforded by a union or a collective-bargaining agreement.

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[37]Ogle applies only to situations where employees remain employed by the employer but are not compensated in accordance with the existing CBA. MIS, 289 NLRB No. 62 slip op. at 6 (June 30, 1988).

[38]If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Subcontracting work of the bargaining unit when the purpose is to escape from the duty to recognize and bargain with the Union and to evade the obligations of the collective-bargaining agreement (CBA).

(c) Refusing to recognize and bargain with the Union as the exclusive bargaining representative of all the employees in the unit described below.

(d) Repudiating the CBA and making unilateral changes in the wages, hours, and terms and conditions of employment of the employees employed in the bargaining unit described below.

(e) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, Respondent Hobbs must bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement. The unit is:

> All production and maintenance employees, employed at the Company's mine in the United States, all salaried supervisors, excluding office clerical employees, guards, and supervisors as defined in the Act.

(b) So long as a joint employer relationship exists among Hobbs, ICC and ECC regarding the bargaining unit, then, on

request, the joint employers must bargain with the Union as the exclusive representative of the employees in the appropriate bargaining unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(c) On request by the Union, terminate the June 4, 1987 contract mining agreement (the subcontract), or any successor agreement involving work of the bargaining unit.

(d) Offer all bargaining unit employees terminated on May 31, 1987 immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions. Do this without prejudice to their seniority or any other rights or privileges previously enjoyed. Discharge, if necessary, any employees hired in the interim. Make the bargaining unit employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, and as a result of the repudiation of the collective-bargaining agreement, in the manner set forth in the remedy section of the decision.

(e) Remove from their files any reference to the unlawful discharges and notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(f) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Post at their Porter, Oklahoma mine, or at any successor location, copies of the attached notice marked

"Appendix."[39] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondents' authorized representatives, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to insure that the notices are not altered, defaced or covered by any other material.

(h) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondents have taken to comply.

Dated Washington, D.C., September 1, 1988.

Richard J. Linton
Administrative Law Judge

[39]If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD".

"APPENDIX"

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own
> choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted
> activities.

WE WILL NOT fail and refuse to recognize and bargain with the Oklahoma Coal Miners Union (the Union) as the exclusive bargaining representative of our joint employees in the unit described below:

> All production and maintenance employees employed at the Company's mine in the United States, excluding all salaried supervisors, office clerical employees, guards, and

supervisors as defined in the Act.

WE WILL NOT repudiate any collective-bargaining agreement (CBA) which covers the employees in the bargaining unit.

WE WILL NOT subcontract work of the bargaining unit when the purpose is to escape from our duty to recognize and bargain with the Union and to evade the obligations of the CBA.

WE WILL NOT make unilateral changes in wages, hours, and terms and conditions of employment of the employees employed in the bargaining unit.

WE you for supporting Oklahoma Coal Miners Union or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL as your joint employers, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for you in the bargaining unit, and Hobbs & Oberg Mining Company, Inc. will, on request by the Union, bargain as stated.

WE WILL, on request by the Union, terminate the June 4, 1987 contract mining agreement (the subcontract), or any successor agreement involving work of the bargaining unit.

WE WILL offer all bargaining unit employees terminated on May 31, 1987 immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions. WE WILL do this without prejudice to

their seniority or any other rights or privileges previously enjoyed. If necessary to make room for the returning bargaining unit employees,

WE WILL discharge any employees hired since May 31, 1987.

WE WILL make whole the bargaining unit employees for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, and from our repudiation of the collective-bargaining agreement, plus interest.

WE WILL notify each of them in writing that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

HOBBS & OBERG MINING COMPANY, INC.
(Employer)

Dated:_____ By:_____
Representative Title

INTERNATIONAL CHEMICAL COMPANY
(Employer)

Dated:_____ By:_____
Representative Title

EASTOAK COAL COMPANY
(Employer)

Dated:_____ By:_____
Representative Title

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's office, 819 Taylor Street, Room 8A24, Fort Worth, Texas 76102-6178. Telephone number (817) 334-2941.

Supreme Court, U.S.
FILED
MAR 6 1992
OFFICE OF THE CLERK

No. 91-961

In the Supreme Court of the United States

OCTOBER TERM, 1991

INTERNATIONAL CHEMICAL COMPANY, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that petitioners were joint employers.

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A4) is unpublished, but the judgment is noted at 940 F.2d 1538 (Table). The decision and order of the National Labor Relations Board and the decision of the administrative law judge (Pet. App. A5-A69) are published at 297 N.L.R.B. No. 85.

JURISDICTION

The decision of the court of appeals was issued on August 19, 1991. The petition for a writ of certiorari was filed on November 12, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In January 1985, Hobbs and Oberg Mining Company, Inc. (Hobbs), began operating the Porter Coal Mine in Porter, Oklahoma. Hobbs contracted to sell the coal extracted from the mine to petitioner International Chemical Company (ICC) and another company not involved in this case. The agreement required Hobbs to sell a certain quantity and quality of coal to the two buyers at a specified price. Pet. App. A19. Since August 1985, Hobbs had recognized the Oklahoma Coal Miner's Union (the Union) as the exclusive bargaining representative of the production and maintenance employees at the mine. Hobbs was bound by the terms of a collective bargaining agreement that was in effect through August 1988. *Id.* at A14.

In late 1986, Hobbs began experiencing financial difficulties, and sometimes failed to deliver to ICC the quantity and quality of coal promised in the contract. Pet. App. A20. In early 1987, ICC began discussions with Hobbs about improving its production. ICC Vice President Kelly brought ICC agent Blevins to the Porter mine to serve as mine superintendent. In March, Hobbs entered into a management contract with Eastoak Coal Company (ECC), a subsidiary of ICC. On the orders of Kelley, who also served as ECC president, Blevins remained at the Porter mine to oversee the operations for ICC and ECC. *Id.* at A6-A7, A21-A22, A44. Blevins supervised employees' day-to-day activities, assigned work, and administered the collective bargaining agreement. *Id.* at A29-A35, A44-A46.

2. a. The NLRB General Counsel filed a complaint alleging that ICC, ECC, and Hobbs, as joint employers, engaged in various unfair labor practices in connection with the operation of the Porter mine. The ALJ found, and the Board affirmed, that, prior to May 31, 1987, ICC and ECC (the Companies) were joint employers, for labor relations purposes, of the production and maintenance employees at the mine. Pet. App. A6, A59. The Board found that, as joint employers, both Companies were liable for violations of Section 8(a)(3) and (1) of the National Labor Relations Act, 29 U.S.C. 158 (a)(3) and (1), by closing the mine and terminating all employees on May 31, and then reopening it under a sham subcontracting arrangement that gave ECC control of the mine as part of a collusive scheme to evade the collective bargaining agreement between Hobbs and the Union. The Board further found that the Companies unlawfully refused to rehire two former mine employees who applied to work at the reopened mine. Pet. App. A8-A9, A59. Finally, the Board found that the Companies violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), by refusing to bargain with the Union, when, after the reopening of the mine, they withdrew recognition, repudiated the collective bargaining agreement, and unilaterally changed wages, hours, and terms and conditions of employment. Pet. App. A59-A60.

b. With respect to the finding that the Companies operated as joint employers at the mine, the ALJ pointed out that "the joint employer concept recognizes that the business entities involved are in fact, separate, but that they share or codetermine those matters governing the essential terms and conditions of employment." Pet. App. A43. The ALJ further noted that "[t]o establish joint employer status, there must be a showing that the alleged joint employer meaningfully affects matters relating to the employment relationship such

as hiring, firing, discipline, supervision and direction." *Ibid.* Here, the ALJ found that Blevins, as the representative of both ICC and ECC (*id.* at A29), acted as general mine superintendent and exercised "pervasive control" over the employees' working conditions. *Id.* at A47. The ALJ concluded that, before May 31, "in fact and practice Hobbs relinquished the lion's share of [] control [over matters affecting its employees] to ICC and ECC." *Id.* at A48.[1]

In upholding the ALJ's findings, the Board relied on Blevins' statement to employees that he was in charge, on his role in resolving a contractual pay dispute with the Union, and on his participation in a work assignment dispute. Pet. App. A6. The Board also agreed that ICC operated as a joint employer at the mine even though Hobbs' management contract was with ECC. The Board observed that Kelley, in his capacity as an officer of ICC, assigned Blevins to work at the mine, and that ICC continued to be involved with the mine after the management agreement between Hobbs and ECC was executed on March 24. *Id.* at A47.

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[1] Before the ALJ (Br. 22-23) and the Board (Br. 32-35), petitioners argued that, even if ECC and Hobbs were found to be joint employers, ICC could be found liable only if it and ECC were a single employer. In rejecting this contention, the ALJ noted that the single employer and joint employer "concepts are distinct from one another," Pet. App. A41, and explained that single employer status "depend[s] on the existence of a single integrated enterprise." *Id.* at A42. See also *id.* at A41 (citing *NLRB* v. *Browning-Ferris Industries*, 691 F.2d 1117, 1122 (3d Cir. 1982)). The ALJ observed, however, that the General Counsel never contended that ICC and ECC constituted a single employer, but rather, relied on the theory that ICC and ECC were responsible for employment matters at the Porter mine as joint employers. Pet. App. A16. The ALJ agreed with the General Counsel that the Companies satisfied the criteria for joint employer status, and therefore did not decide whether they might qualify as a single employer as well.

3. The court of appeals affirmed the Board's decision and order in an unpublished opinion. Pet. App. A4. The court agreed with the Board that "ICC [had] placed its employee, Mr. Blevins, in charge of the mine" prior to its closing. The court also found that the mine remained in the Companies' control after it reopened. *Id.* at A3-A4. On the basis of those findings, the court concluded that there was "substantial evidence to support the findings of the ALJ and the NLRB" that the Companies were liable as joint employers. *Id.* at A4.

ARGUMENT

This Court has stated that employers operating as distinct business entities may be considered joint employers under the National Labor Relations Act if they "possess sufficient[] control over the work of the employees." *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 481 (1964). As petitioners acknowledge (Pet. 3), the Board applies the same test for joint employer status. See generally *W.W. Grainger, Inc.*, 286 N.L.R.B. 94, 95 (1987); *Chesapeake Foods, Inc.*, 287 N.L.R.B. 405, 407 (1987). Petitioners' principal objection to the decision below is that the Board should not have characterized the Companies as joint employers on the facts of this case. Petitioners' contention is without merit: the evidence fully supports the Board's finding that the Companies shared control over the work of the employees. On the basis of that finding, the court of appeals correctly upheld the Board's determination that the Companies were liable as joint employers. That decision does not merit further review by this Court.

1. Under Board precedent, two companies can be held liable for a single violation of the Act if they were operating as a single employer or as a joint employer. See Pet. 3, and decisions cited therein. Petitioners suggest (Pet. 3-4) that the ALJ's findings of fact would have supported a conclusion that the Companies acted

as a single employer, but that the decision cannot be upheld on that theory because it was not raised by the Board's General Counsel at the hearing. Petitioners offer no reason why this procedural issue would support a grant of certiorari under this Court's rules. In any event, the Board's factual findings fully support the conclusion that the Companies could be held liable as joint employers.

Although the ALJ remarked in passing (Pet. App. A29, A44) that Kelley operated ICC and ECC as a single, integrated company, he based his conclusion that the Companies operated as joint employers at the Porter mine on the finding that Blevins acted as the agent of both Companies as separate entities. *Id.* at A44. Similarly, although the Board noted in passing "ECC's involvement at the policy level" in the operation of the Porter mine (Pet. 5), it relied on its determination that ECC, through Blevins, exercised "actual control over how the work of [the] employees is to be performed" (Pet. 4) in concluding that ECC and ICC were joint employers at the mine. The Board based its conclusion on the finding that Blevins, as the agent of the Companies, was actively involved with the employees' work performance and labor relations. Petitioners do not dispute that factual determination, which is supported by substantial evidence and is not clearly erroneous. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

In any event, the fact that ICC and ECC might also qualify as a single employer does not preclude the finding that they were joint employers. Here, both Companies satisfied the requirement—relevant to both the single and joint employer determination—of shared control over the employees' working conditions.

2. Petitioners also contend that various courts of appeals appear to examine different factors in evaluating joint employer status. Contrary to petitioners' con-

tention (Pet. 5-6), however, this case does not present any occasion for resolving any differences that might exist among the circuits concerning the joint employer determination. To be sure, the Eighth and Seventh Circuits have, on occasion, blurred the distinction between joint employer and single employer status by applying to joint employer determinations the four-factor test for single employer status formulated by the Board in *Parklane Hosiery Co.*, 203 N.L.R.B. 597, amended, 207 N.L.R.B. 991 (1973); Pet. 3-4. See *Pulitzer Publishing Co.* v. *NLRB*, 618 F.2d 1275, 1278-1279 (8th Cir.), cert. denied, 449 U.S. 875 (1980); *Sheet Metal Workers Union* v. *Public Service Co.*, 771 F.2d 1071, 1074-1075 (7th Cir. 1985). Nonetheless, there is general agreement among the courts of appeals that "sufficient evidence of immediate control over the employees" is the paramount consideration in making a finding that employers share joint responsibility under the Act. See *Clinton's Ditch Cooperative Co.* v. *NLRB*, 778 F.2d 132, 138 (2d Cir. 1985) (refusing to find joint employer status without evidence of "immediate control" over employees), cert. denied, 479 U.S. 814 (1986). Thus, although the Seventh and Eighth Circuits recite the more elaborate four-part test in some decisions, see *Pulitzer Publishing Co.* v. *NLRB*, *supra*; *Sheet Metal Workers Union* v. *Public Service Co.*, *supra*, those courts have, in practice, emphasized the factor of day-to-day control over employee affairs in concluding that a joint employer relationship exists. See, *e.g.*, *Industrial Personnel Corp.* v. *NLRB*, 657 F.2d 226, 228 (8th Cir. 1981), cert. denied, 454 U.S. 1148 (1982) (four-part test); but see 657 F.2d at 229 & n.3 ("We agree with the Board's finding that there is no common management, ownership or financial control but we find these facts are not crucial to our determination."); *NLRB* v. *C.R. Adams Trucking, Inc.*, 718 F.2d 869, 870 (8th Cir. 1983) (reciting four-part test in reliance on *Pulitzer Publishing*, but relying solely on

"control over the employment conditions" in finding that employers shared joint responsibility); *Ace-Alkire Freight Lines, Inc.* v. *NLRB*, 431 F.2d 280, 282 (8th Cir. 1970) (employers operated jointly because "[b]oth shared in the hiring process and both exercised control over the manner in which the men performed their duties"). See also *Davis* v. *NLRB*, 617 F.2d 1264, 1271-1272 (7th Cir. 1980) (in applying four-part test, focussing almost exclusively on lack of centralized management and control over labor matters); *Lutheran Welfare Services* v. *NLRB*, 607 F.2d 777, 778 (7th Cir. 1979) ("if two or more employers exert significant control over the same employees, they constitute 'joint employers' under the NLRA").[2] Petitioners have failed to demonstrate, in light of these cases, that the joint employer issue would be decided differently in any other circuit on the facts of this case.

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[2] *Sheeran* v. *American Commercial Lines, Inc.*, 683 F.2d 970, 978 (6th Cir. 1982) (see Pet. 6), is inapposite; the Sixth Circuit in that case made a finding that the employers qualified as a single employer, not that they were joint employers. Petitioners also err in suggesting that there is any inconsistency between this case and the Board's decision in *Island Creek Coal Co.*, 279 N.L.R.B. 858 (1986). See Pet. App. A47 (discussing the factual distinctions between this case and *Island Creek*). In any event, even if there were a conflict between the court of appeals' decision and an unreviewed decision of the Board, this Court need not resolve it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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